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JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States

OCTOBER TERM 1905

THE UNITED STATES, *Appellant*
vs.
THE CHEROKEE NATION } No. 346.

THE EASTERN CHEROKEES, *Appellants*
vs.
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vs.
THE UNITED STATES } No. 348

Appeals from the Court of Claims

REPLY BRIEF

For the Eastern and Emigrant Cherokees

APPELLEES.

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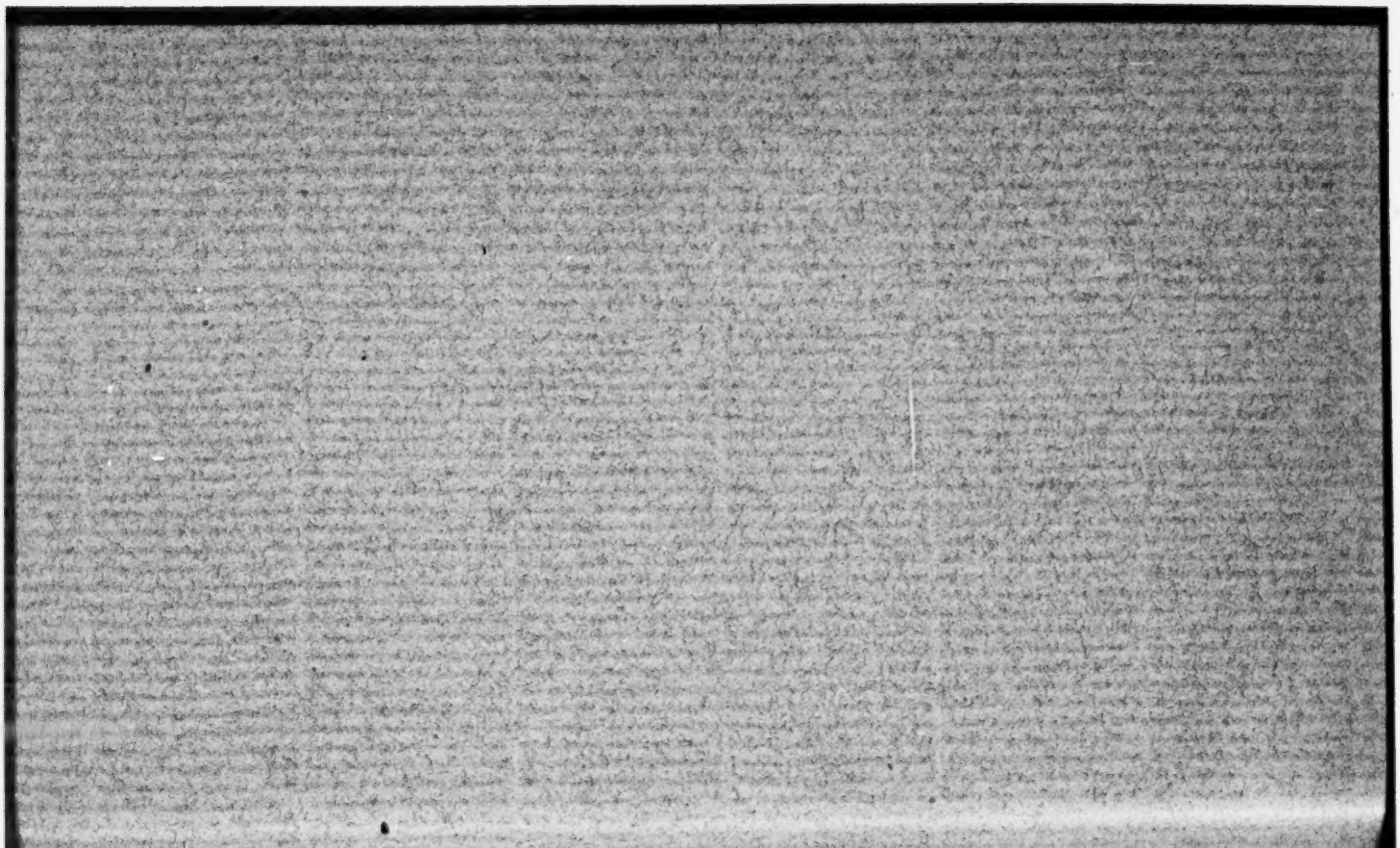

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APPELLEES.

1. In replying briefly to the very learned and elaborate argument of the attorney for the Government, counsel for the Eastern and Emigrant Cherokees begs leave to state that while this case is not strictly *res judicata,* not being the finding of a Court, it is virtually, and, should be so considered, as *an award under a treaty.*

2. The United States made its own agreement with the Cherokees for the sale of the Oklahoma Strip, one of the conditions of which was, to pay them, the Cherokees, all outstanding obligations between them. The United States appointed their own Commission, used their own books, receipts and vouchers, and this Commission among other things, found that there was due for the removal of the Eastern Cherokees $1,111,284.70, with interest at 5 per cent per annum, from June 12, 1838 until paid. This account was accepted by the Cherokee Nation, and by the United States; not denied by the Secretary of the Treasury, who said he had nothing to add to the account; was approved by the then Secretary of the Interior, Hoke Smith, and reported to Congress for an appropriation.

3. It would seem that after this procedure that the United States are concluded by the findings of their duly appointed Commissioners, and by the law of good conscience and fair dealing, sanctioned by the United States Supreme Court in the Arredondo case, 6 Peter, p. 691.

4. As to the claim of the Western Cherokee Nation, that this money if paid belongs to them; this could only be true as constructive trustees of the fund under the agreement, as the Western Cherokees, or the Cherokee Nation, so called, were paid their one-third share of the fund, as provided by the treaty of 1835, Sept. 30, 1850, and the remaining balance in 1894, Aug. 23rd, and therefore can have no lien on this award, which belongs as distinctly set forth, to the Eastern Chero-

kees for the sale of their lands in North Carolina, Georgia and Tennessee, and as the Nation and its government will expire on the 4th of March, 1906, both dejure and de facto, it cannot be paid to them.

5. This money when paid will go into the homes of thousands of poor farmers where a few dollars for tools and subsistence will do a great amount of good, and must be paid per capita or per stirpes.

I have personal knowledge of these people, having visited them in their homes, and represent about six thousand of them by individual or family powers of attorney as provided in the treaty, which are executed and filed in this cause

Notwithstanding that the Treaty of 1846 Art. 1, provided that "the lands occupied by the Cherokee Nation shall be secured to the whole people, and a patent shall be issued to them by the United States," no portion of the money paid for the many sales of this land by the Western Nation or Old Settlers, has ever been paid to the Eastern and Emigrant Cherokees nor have they been allowed to any great extent during the last decade to settle on lands in the Indian Territory, and to receive their allotments from the Cherokee Nation, who have excluded them for purposes of their own, but principally because it would reduce their pro rata. The various sales of Cherokee lands West by the Nation, amounted Sept. 13, 1882, to $8,070,571.70, and the sale of the Cherokee Outlet to $8,600, or a total of $16,670,571.70, all of which has been paid

to the Cherokee Nation, or Old Settlers, and distributed to its members, and not any portion of it, with a few exceptions, to the Eastern and Emigrant Cherokees, so called. Among these are what is known as the Pride Roll, consisting of 536 persons, who tried to remove under the auspices of J. A. Pride from North Carolina, July 23, 1896, but no money could be obtained to remove them on application, and a roll of 858 persons who removed themselves at their own expense in 1858, who have not been repaid. The balance of the 6,000 persons are those still remaining in North Carolina, North Georgia, and Eastern Tennessee, and those of their children who have gone West to the Indian Territory, with a few in Missouri and Oklahoma who have not been incorporated in the Cherokee Nation, and have not received its benefits.

6. The argument put forth that the Slade Bender account rendered is not an award because rendered by the debtor, and not by the creditor, has the unusual aspect that the fund of $5,000,000 for the sale of lands in North Carolina and Georgia, that the books, accounts, receipts and vouchers were all in the hands of the debtor, and the creditor was at his mercy and could not well have rendered the account.

Counsel for the Government not only attacks Slade and Bender for their report, honestly rendered, but the Secretary of the Interior for the ratification of that report, and sending it to Congress, and by implication the Secretary of the Treas-

ury, who acquiesced in the report, and said when called upon through the Court, that he had nothing to add to it.

7. I do not understand the agreement, as do the counsel for the Government and the Court below, that the award or account of Slade and Bender was to be a portal through which the Cherokee Nation could carry the rights and wrongs of its people to a judicial forum," as this was to be done only on condition that the National Council should find such accounting incorrect or unjust. The National Council accepted the account as correct, and the Secretary approved it. It should have been paid. There was no occasion for further legislation.

8. R. p. 51, the Court says: "The action of the Secretary of the Interior combined with the inaction of Congress to direct anything to the contrary, makes this provision of the argument final and conclusive." The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament."

9. P. 44, defendants' brief: "The case is wholly unaffected by the report of Slade and Bender, except in so far as it exhibits the true state of the account, the record of the facts, and acts of the Government, as they actually occurred at the respective times of the various transactions." The United

States herein admits that the account of Slade and Bender is correct as to amount, time and place. Not much more is needed for our argument. His predecessor, Mr. Gorman, said: "The facts are historical in their nature—are not subject to dispute or controversy. The question presented by the record is purely one of law, to wit: whether the cost of the removal of the Eastern Cherokees to the Indian Territory is to be borne by the Cherokee Nation and deducted from the Treaty fund, or whether the cost thereof is to be defrayed by the United States without charge to the Indians." This is the gist of the whole matter, and the words of the treaty are so clearly stated that it seems impossible to mistake its meaning.

10. P. 51 to 53. Government brief: The United States agreed to remove the Indians, without any specification as to what the cost might be, at its own expense. They were to be given $5,000,000 for 14,000,000 acres of land, in North Carolina, Georgia, etc., removal, subsistence on the passage, and subsistence for one year after arriving. It has been the custom of the Government from time immemorial, whenever it has removed a tribe of Indians to remove them at its own expense, and the removal has been in nearly every instance, to accommodate the Government and not the Indians. I have not been able to find an instance where the Indians have removed themselves. These people had no desire to leave their homes, but were forced away at the point of the bayonet.

I think it simply an inference of the solicitor and not a fact

that any further cost of removal above $600,000 was to be deducted from the $5,000,000 fund. Read Article 15, Treaty of 35 in this connection and read Article 3 of the Treaty of 1846.

All this was enacted after the appropriation of the amounts, and matters and things named in counsel's brief for the Government, showing that a contrary intent prevailed.

12. P. 83, Government brief: "In order to ascertain the per capita division to be made, pursuant to the Treaty of 1835, which per capita division finds mention only in Art. 15, of that Treaty." Read Art. 9 of the Sixth Treaty of Washington, and the latter part of Art. 3, preceding it.

13. P. 89, Government brief: "Prior to the payment of the sums thus appropriated by them, the Western Cherokees and the Cherokee Nation protested against these settlements as insufficient,—the Western Cherokees because they had been charged with the cost of subsistence, contrary to the resolution of the Senate, and the Cherokee Nation because the Treaty fund had been charged with a part of the cost of removal." This passage itself, although quoted for a contrary effect, shows that the claim we make today under "The Agreement" for the conveyance of the Cherokee Strip, a piece of land large enough to form a State, and whose unprecedented settlement leads them now to clamor for admission as a State, wherein the United States agreed to settle all of its old disputed accounts with the Cherokees, is the same claim made in 1851, viz.: that the Treaty fund had been charged with the

cost of removal. This is probably the last suit that will ever be brought by the Cherokee Nation v. the United States. This statement is conflicting. The protests here were made by the Western Cherokees, and the Cherokee Nation, whom we have considered heretofore as one, and the receipts were given according to this authority by the Western Cherokees and the Cherokee Nation. Art. 12 of the Treaty says, "the Western Cherokees, called Old Settlers." We admit and claim that the Cherokee Nation at that time, Aug. 23, 1894, received all the money that was due to it. Doc. 11, 54th Con. 1st Sess. But this settlement evidently did not include the 4,000 or 5,000 North Carolina and North Georgia Cherokees, for whom we are contending for they cannot be considered as emigrants, and are residing still at or near the place of their birth, and those of their children, who have removed West since 1850, who make up principally these individuals and families of Cherokees named herein. It was their land that was sold to create the $5,000,000 fund, and as they have never removed at all could hardly be charged with a bill for removal.

14. Government brief, p. 96: The solicitor again arrives at the gist of this controversy and says: "The question is whether the remainder was to be charged against the $5,000,000 fund, or to be paid by the United States in addition thereto." In answering this, we refer again to the wording of the Treaties of 1835 and 1846, and to the Cherokee Agreement, of which the payment of this award forms a part of the compact. The

amount received by the Government is a very ample compensation for this demand, principal and interest, large as it is, and should have been paid without demurrer, or the incurrence by the Cherokees of the great expense and delay of legislative and judicial action. The Government has already enjoyed the usufruct for 12 or more years.

15. The payments, however set forth on pages 89 and 90 of Government brief, with receipts attached to John Drennan, were in part for subsistence, and in part for removal, and we admit that at that time the Western Cherokees or Old Settlers, alias the Cherokee Nation, received the part payment for their removal, and the balance of the one-third set apart for them in the Sixth Treaty of Washington, January 18, 1866, both subsistence and removal being based on Art. 4 of that Treaty, but not so the Eastern Cherokees. Strangely enough these receipts do not show for what they were given, but the Indians were obliged to sign them, in order to get money at all.

The Congress of the United States has always recognized its obligation to remove the Indians at its own expense, and did so with the Choctaws, Chickisas and Creeks, not only in the treaties in which it promises to refund those who pay for their own transportation, but it has repeatedly paid back to individual Cherokees the money which they have expended for their own removal, and the Auditor of the Treasury allowed a goodly number of such cases as late as Aug., 1893, but did not pay them. (See testimony on file in this case.)

Interest.

16. Interest is charged upon the sum in question because the $1,111,284.70 was taken from an interest bearing fund—a trust fund in the hands of the Government, and all of the sums heretofore paid from this fund have borne interest at the rate of 5 per cent per annum from the date of the wrongful taking. Mention is made of interest in the Treaty of 1846, and it was agreed that the question of interest should be left to the Senate, whereupon the Senate voted that interest should be paid from June 12, 1838 at 5 per cent to date of payment.

17. This is not such a case as was contemplated in U. S. R. S. Sec. 1091, but is a case in which the payment of interest seems to be inseparable from the payment of the principal itself. Interest was paid on the subsistence fund in the two cases and interest was allowed on the one-third share of the removal fund paid to the Western Cherokees or Old Settlers. The skilled accountants, whom Government counsel admits could state a correct account, allowed interest on the four items, one running back to February 27, 1819, and Government counsel has accepted and allowed it without demurrer, and the Court of Claims after a careful and painstaking hearing lasting through two weeks of its session, has given its judgment for interest on this account. To deny interest to these people after the Government by its own wrong has allowed them to suffer this long delay, and then has renewed this promise of payment; required them to secure special legislation in two

instances, and the decision of the two highest courts in the United States, with its brightest legal talent arrayed against them, would seem to be adding insult to injury, to say nothing of the payment for the labors of their own attorneys.

18. The Government allowed interest on the deferred payments with reference to the Outlet, and Congress appropriated money for the interest. It was a real estate transaction, and so is this claim in effect.

In that case the United States received 14,000,000 acres of land and the Indians $8,600,000, or about 61 3-7 cents per acre, one of the largest real estate deals among the many that the Government has made with the Indians. This Government has paid millions for battleships, let it pay its honest dues to the Cherokees without quibbling or technicalities.

The Cherokee Nation or Western Cherokees.

19. The Eastern and Emigrant Cherokees agree with the Cherokee Nation in its contention against the Government that it should pay the $111,289.70, with interest at 5 per cent per annum from June 12, 1838, but differ with them commencing with page 89 of counsel's brief, where he asks that this whole sum should be paid to the Cherokee Nation for distribution—a proposition under their present legal status, that this Court can hardly consider. If it should do so, then we ask, as we asked in our intervenor in their cause which the record was corrected in order to set forth; that one-fourth of the whole

sum should be adjudged to the Eastern and Emigrant Cherokees to be distributed by the Secretary of the Interior to the persons entitled to receive it. Since our intervenor about 1,500 persons of the same class have been added to our numbers. This request is made on account of reasons set forth in our intervenor.

20. The 15th article of the Treaty of New Echola says, after providing "for the additional quantity of lands and goods for the poorer classes of Cherokees and the several sums to be invested for the general national funds provided for in the several articles of this treaty; the balance, whatever the same be, shall be equally divided between all the people belonging to the Cherokee Nation East, according to the census just completed, and such Cherokees as have removed West since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final Treaty between the United States and the Cherokees East, they shall also be paid for their improvements, etc."

2 / Mr. Gorman, Mr. Pradt's predecessor, now deceased, in his brief in this cause before the Court below, said, "the payment of this money when made, in order to comply with the Treaty must be made per stirpes, or per capita, and so my clients understand it. (This includes the Treaty of 1835 and 1828, Art. 17, latter portion.) "All stipulations in former treaties which have not been superseded or annulled by this, shall continue in full force and virtue."

22 Art. 3, Treaty of 1846: The said United States agree to reimburse the said fund, the amount thus charged to said fund and the same shall form a part of the aggregate amount to be distributed to the Cherokee people as provided in the 9th article of this Treaty." * * * The United States not only agree to pay for the expenses of the Treaty, "but all other sums improperly charged, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty. Ninth article says: "And the several sums provided in the several articles of the Treaty to be invested as the general funds of the Nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the Treaty of 1835. The aggregate of which several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives entitled to receive the same under the Treaty of 1835, and the supplement of 1836, being all those Cherokees residing East at the date of said Treaty, and the supplement thereto."

23 Art. 10. It is expressly agreed that nothing in the foregoing Treaty contained shall take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi river, had or may have under the Treaty of 1835 or the supplement thereto.

This is our case—this takes in our people, but payment to

the Cherokee Nation would take away every dollar of our inheritance.

24 The Eastern and Western Cherokees referred to by counsel for the Nation does not include our people, or the North Carolina and Georgia Cherokees and Eastern Tennessee, nor those who have gone West since the date of union, or those whom we term Eastern and Emigrant Cherokees, now numbering 6,000 persons more or less, who have sued as individuals, and whose lands were sold to create the fund in contention.

THE EASTERN CHEROKEES.

25 We are in accord with the Eastern Cherokees and agree with their contention both as against the United States and against the Cherokee Nation, but differ from them in the award of the fund. They claim a judgment for the whole fund and that their clients include the Eastern and Emigrant Cherokees, which we deny. We ask for one-fourth of the whole sum to be distributed as named, and believe that the Eastern Cherokees should receive the balance.

BELVA A. LOCKWOOD,
Counsel for Eastern and Emigrant Cherokees.

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THE UNITED STATES AND THE CHEROKEE NATION.

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THE CHEROKEE NATION, APPELLANT,

v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Brief of the Eastern Cherokees.

THE EASTERN CHEROKEES,
By
ROBERT L. OWEN,
ROBERT V. BELT,
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Attorneys of Record.

JAMES K. JONES,
SCARRITT & COX,
M. C. BUTLER,
JOHN VAILE,
Counsel.

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BRIEF OF ARGUMENT.

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Brief of the Eastern Cherokees.

STATEMENT OF THE CASE.

The Eastern Cherokees, appellants, are the Eastern Cherokees, both East and West of the Mississippi River, suing as a band of the Cherokee Tribe, and as one body.

They comprise those Cherokees who owned and occupied the lands east of the Mississippi River sold the United States by the Treaty of 1835-36. The proceeds of this sale, less certain agreed charges, was promised them per capita and is now the object of this suit.

The Emigrant Cherokees (Rec. 8) are not a band, but private persons claiming to be Eastern Cherokees and, as such, to be entitled to share in the per capita.

The Cherokee Nation, appellant, appears as a body politic or governmental organism.

In 1828 the United States obligated themselves by the 8th Article of the treaty of that date to remove the Eastern Cherokees from the east to the west of the Mississippi River and to subsist them for twelve months at the expense of the United States.

This was the general policy of the United States in dealing with all Indians east, the Choctaws, Chickasaws, Creeks, Seminoles, and adjacent tribes, and was due to political considerations of the highest importance.

On March 6, 1835, the Senate of the United States upon submission of the question, made an "award" by a resolution, advising the payment to the Eastern Cherokees of the sum of five million dollars for their "lands and possessions" east of the Mississippi. The five millions proposed to be paid as the purchase price of the "lands and possessions" included no other consideration. When this award was made the United States was under the subsisting obligation, above mentioned, to pay the entire cost of the removal and subsistence expenses of the Eastern Cherokees.

On October 23, 1835 a proposed treaty, bearing date March 14, 1835, was submitted to the Cherokee council at Red Clay, proposing to pay the Cherokees five mil-

lions of dollars for their lands and possessions. In Article 18 of this instrument there was a schedule of items to be charged against the five million fund. Among these items was a charge of $255,009 for removal. The proposed treaty was unanimously rejected, even those believing a treaty necessary and favoring a treaty, refusing to support this proposition to charge the Cherokees with the cost of removal. This proposed treaty was explained by a letter of President Andrew Jackson, read to the Cherokees October 23, 1835, which stated among other things, that the United States would pay the cost of the removal and subsistence of the Cherokees at its own expense, and would pay the Cherokees a per capita of $150 each on their arrival in the west.

Treaty of 1835-36.

On December 29, 1835, a treaty was signed by a few unauthorized Cherokee citizens, selling to the United States the whole Cherokee country, 7,882,240 acres.

By Article 1, the United States agreed to pay five million dollars to the Cherokees for their lands and possessions.

By Article 8, it was agreed the United States would "also" remove the Eastern Cherokees and subsist them one year after their removal west, and that self-emigrating Cherokees should be reimbursed at the rate of $20 per capita for removal and $33.33 for subsistence.

By Article 15, which provided that the balance of the five millions after certain deductions should be paid the Eastern Cherokees per capita, the words "removal, subsistence," were inserted as items to be deducted from the five million fund.

The Indians who signed this instrument, immediately

protested that the Cherokee people supposed the five million fund was not intended to include the expense of removal. This was confirmed to the President of the United States on February 29, 1836, in a letter of Senator Cuthbert and others, who had voted the Cherokees the award of March 3, 1835. The President obviously thought the Cherokees right in their contention and submitted supplementary articles by which the Senate of the United States decided, May 18, 1836, that it was not the intention of the Senate that the five million fund should include the expense of removal.

On July 2, 1836, Congress sanctioned and confirmed the interpretation of the Senate and appropriated a sum estimated as more than sufficient to meet the entire cost of removal expenses, and of spoliations, which also was not intended to be included in the five million fund.

After this treaty had been ratified the War Department still held that the obligations of the 8th Article of the Treaty of 1828 were in full force and so advised the Cherokee Indian agent, B. F. Curry, November 18, 1836. The Cherokees, of course, were apprized of this executive construction.

After this treaty the War Department continued to advise the Cherokees that they would be removed and subsisted at the expense of the United States and would be paid a per capita of $150, as promised by President Jackson in the letter read to the council of Cherokees at Red Clay October 23, 1835. The War Department so instructed Lieutenant J. VanHorne, its enrolling agent, September 12, 1837.

On December 6, 1837, Attorney General B. F. Butler held (3 Op. 297) that:

"The expense of removal is undoubtedly the first charge on the $600,000."

The Indians who signed the Treaty of 1835-36, were bribed by the commissioner negotiating the treaty, who paid them over $30,000 for their services and expenses. These unhappy men were outlawed and many of them assassinated by the Cherokees.

The Eastern Cherokees almost unanimously refused to recognize the treaty as binding on them, and neither the Eastern nor the Western Cherokees recognized it as a valid instrument until the Treaty of 1846, and except in the manner provided by that treaty.

Removal of 1838.

In May, 1838, the Cherokees were made captive by an army under General Scott, and thrown into camps of concentration.

John Ross, the Principal Chief of the Cherokees, besought the War Department to make a treaty which the Cherokees could recognize. His prayer was refused, but the Secretary of War proposed to the Cherokees that they might emigrate themselves and that the United States would defray the expense of their removal. This communication to John Ross of May 18, 1838, was submitted to Congress by the President of the United States, and was sanctioned and approved by Congress, which, having required an estimate to cover the entire cost of removal and subsistence, appropriated the full sum estimated for, to wit, $1,047,067, on June 12, 1838. The Act of Congress appropriating this money contained the following proviso:

"That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty."

The War Department had already placed in the hands of a disbursing agent of the United States, Cap-

tain John Page, a large fund taken from the five millions for the purpose of meeting the expense of the removal by the military as determined on in the previous May. The War Department used this fund for removal expenses and expended the sum of $1,111,284.70, out of the five million fund, for removal expenses; while the fund appropriated for removal, $1,047,067, on June 12, 1838, remained in the Treasury of the United States untouched until January 1, 1839, when the removal had been practically concluded.

The Eastern Cherokees took their government west and thus became involved in a fierce conflict with the Western Cherokees, who refused to relinquish their government previously established, or to merge with the Eastern Cherokees.

On January 17, 1845, Hons. Roger Jones, R. B. Mason and P. M. Butler, commissioned by the President to inquire into the Cherokee difficulties, made their report to the effect that the $5,000,000 fund was not chargeable with the expense of removal, and that the per capita promised the Cherokees was due and should be promptly paid.

Treaty of 1846.

The Treaty of 1846 was made necessary to stop the warfare between the Cherokees, to settle the claims of both the Eastern and Western Cherokees against the United States, and to make the Eastern and Western Cherokees parties to the Treaty of 1835-'36, which they had never conceded themselves to be.

The Treaty of 1846, by Article 4, arranged a plan by which the Western Cherokees should be paid for their communal interest in the lands east. The Western Cherokees have been fully paid under this article under a decision of this Court, October Term, 1902 (148 U. S., 427).

The Eastern Cherokees were to be paid for their communal interest in the lands east, as by Article 9, Treaty of 1846, as qualified by Articles 3, 10 and 11.

Article 9 pledged the Eastern Cherokees a "fair and just settlement" under the Treaty of 1835, which settlement should exhibit "all moneys properly expended under said treaty," and should embrace all sums paid under the various captions ordinarily used to describe the different heads of expenditure, to wit, improvements, ferries, spoliations, removal, subsistence, debts, invested funds, etc. with the provision that such expenditures should be deducted from the sums appropriated to the Eastern Cherokees aggregating $6,647,067, and the balance should be paid to the Eastern Cherokees per capita.

The aggregate referred to was composed of the five million fund; the $600,000 appropriated July 2, 1836; and the $1,047,067 appropriated June 12, 1838.

When the Auditing Department made up the account of the Eastern Cherokees under the 9th Article, they charged the five million fund with the sum of $1,111,284.70 for removal expenses, contrary to the understanding of the Cherokees and contrary to the interpretations made by the War Department, by the Department of Justice (3 Op. 297) by the Senate, and by the Congress as heretofore set out, and found due the Eastern Cherokees only $914,026.13.

Congress appropriated the money by Act of Sept. 30, 1850	$189,422.76
And Act of Feb. 27, 1851	724,603.37
	$914,026.13

which accordingly was paid the Eastern Cherokees per capita in 1852.

The Cherokees before receiving such payment under this accounting rendered by the Auditing Department made their proper protest through the National Council, setting up that it was unfair to them and contrary to the meaning of the treaty and that the expense of removal was not chargeable to the $5,000,000 fund, and having so protested they were paid in accordance with the Act of Congress. The Act of Congress required the Cherokees to give a receipt for all claims and demands on the United States, "except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees."

The Eastern Cherokees vainly endeavored to secure the balance so held in trust for them under Act of July 2, 1836, and payable per capita by the United States, but were unable to do so.

The Cherokee Agreement of 1891.

In 1890 the United States sought to buy the Cherokee Outlet from the Cherokee Nation, which at that time was composed of the Eastern Cherokees and Western Cherokees and their descendants, of the Delawares, Shawnees and adopted Freedmen who had been made citizens of the Cherokee Nation by the treaties of 1866, and by the Delaware and Shawnee agreements.

The Eastern and Western Cherokees had never been paid all the money due them per capita under the Treaty of 1846, for the lands they had sold the United States in 1836, and they refused in 1890, to sell the Cherokee Outlet to the United States.

In 1891, under the further solicitation of the United States, the Cherokee National Council representing all the Cherokee citizens who owned the Cherokee Outlet, agreed that it would sell the Outlet, which exceeded

eight millions acres, for a certain sum in cash, and for a further consideration, and as a condition precedent, that the United States would render to the Cherokees a full account of the moneys due them under the various treaties, and that if the United States should find upon its own accounting that there was money so due the Cherokees, that the United States would immediately pay it. By this stipulation of the agreement the Cherokees also had the right, in case they thought the accounting was unjust or incorrect or improperly made, to bring suit against the United States with the right of appeal to the Supreme Court.

On March 3, 1893, Congress ratified this agreement and provided for the accounting.

When that agreement was negotiated, the Western Cherokees were prosecuting a suit against the United States for the balance of the per capita due them under Article 4 of the Treaty of 1846. The case was decided by the Supreme Court, April 3, 1893, and under the decision the Western Cherokees have been paid in full for their interest in the lands east of the Mississippi River. (148 U. S., 427.)

They made no claim to the expert accountants during the making of the account; none was made for them, and nothing was allowed to them. The accounting pointed out the settlement made with them by the Supreme Court. They were satisfied with the settlement, and the Western Cherokees are not now claimants, and are not parties to the pending suit.

The Account Was Rendered May 21, 1894.

On May 21, 1894, the United States having made up the account in the manner and form agreed on, rendered said account to the Cherokee Nation. On De-

cember 1, 1894, the Cherokee National Council accepted the accounting, which included three items of trifling amount, which the United States conceded in the Court of Claims, and one great item of $1,111,284.70 with interest from June 12, 1838, until paid. Interest was allowed on this sum in pursuance of the award of the United States Senate of September 5, 1850. A submission of this question of interest had been provided by Article 11 of the Treaty of 1846, and the Senate had found, September 5, 1850, that interest at the rate of five per cent. per annum, should be allowed upon all sums found due the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid. (Senate Journal, 31st Congress, 1st Session, p. 602.)

Congress sanctioned and confirmed this award of the Senate and paid interest in accordance with the award on various occasions where partial payments were made. The Supreme Court of the United States found that the award of the Senate was controlling as to the balance due the Western Cherokees (148 U. S., 427). The allowance of interest in this case is identical in principle with that found due by the court in the case of the Western Cherokees.

This sum, $1,111,284.70, was found as the balance of the per capita promised under Article 9 of the Treaty of 1846 to the Eastern Cherokees.

It was not paid by the United States as agreed to be paid, but on July 1, 1902, Congress passed an act authorizing suit to be brought by the Cherokee Tribe or any band thereof for any sums claimed under any of the treaties.

The Cherokee Nation thereupon brought suit in the Court of Claims against the United States February 20,

1903, not as a Tribe of Indians, but as a body politic. (Rec., 1.)

On March 3, 1903, the Eastern Cherokees were authorized to bring suit for the identical claim now in suit, the Cherokee Tribe to be made party to such suit and the judgment to go to the "rightful claimant." (Rec., 78.)

The Eastern and Emigrant Cherokees so called, who were private individuals claiming to be Eastern Cherokees, brought suit on the ground that they were parties in interest in the pending suit, and filed their petition March 10, 1903.

The "Eastern Cherokees" under the authority of the Act of March 3, 1903, filed their suit March 14, 1903, as a "band" of the Cherokee Tribe.

These suits were consolidated and the parties required by the court to interplead.

The Cherokee Nation did not answer the petition of Eastern Cherokees against it and did not interplead, but contented itself by replication to intervening petition of Eastern Cherokees with a denial of any past, present or future relation of trust between the Cherokee Nation, and the Eastern Cherokees. It claims the fund for itself as a body politic. (Rec. 1, last paragraph, 40, last paragraph.)

The consolidated cases were heard on February 14, 15, 16, 20, and 21, 1905, by Messrs. Charles Nagle and Edgar Smith and Frederick D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood on behalf of certain individual claimants styled Eastern and Emigrant Cherokees; and Mr. Assistant Attorney General Pradt on behalf of the United States; and submitted.

Judgment of Court of Claims.

On March 20, 1905, the opinion of the court was delivered with concurring and dissenting opinions. On May 18, 1905, was rendered the findings of fact, conclusions of law and judgment.

The court decreed that the Cherokee Nation do have and recover of and from the United States as follows:

Item 1. The sum of $2,125, with interest thereon at the rate of 5 per cent. from February 27, 1819, to date of payment.

Item 2. The sum of $1,111,284.70, with interest thereon at the rate of 5 per cent. from June 12, 1838, to date of payment.

Item 3. The sum of $432.28, with interest thereon at the rate of 5 per cent. from January 1, 1874, to date of payment.

Item 4. The sum of $20,406.25, with interest thereon from July 1, 1903, to date of payment. (Rec., p. 112.)

Items 1, 3, and 4, we understand are not in controversy, being conceded by the United States.

The Eastern Cherokees do not dispute with regard to such items but point out that they are made payable to the United States as trustee for the Tribe.

The judgment further provides as follows:

The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the Act of March 3, 1903 (32 Stat. 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

1st. To pay the costs and expenses incident to ascer-

taining and identifying the persons entitled to participate in the distribution thereof, and the costs of making such distribution.

2nd. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the Treaty of New Echota, as proclaimed May 23, 1836, or the Treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals. (Ibid, 113.)

The United States by their Attorney General Mr. Louis A. Pradt, prayed an appeal on June 8, 1905, from the said judgment, which appeal was allowed.

The Eastern Cherokees by their attorneys, Robert L. Owen and Robert V. Belt, made application for an appeal on the 9th day of June 1905, which was allowed; and the Cherokee Nation by its attorneys Messrs Finkelnberg, Nagel & Kirby and Edgar Smith on July 3, 1905, prayed an appeal from so much of the judgment—

"As provides that the sum of $1,111,284.70, with interest thereon from June 12, 1836, to date of payment, less certain counsel fees and expenses, shall be paid to the Secretary of the Interior to be by him distributed in accordance with the further terms of said judgment." (Rec. 115.)

This appeal of the Cherokee Nation was allowed. In effect it is an appeal against the payment of said fund to the Eastern and Western Cherokees per capita. In the replication of the Cherokee Nation to the intervening petition of the Eastern Cherokees (Rec. p. 40, last paragraph), the attorneys of the Cherokee Nation expressly denied that the Cherokee Nation if it should collect such fund would hold it as an implied "trust for the benefit of the Eastern Cherokees exclusively or otherwise." In effect they maintained the money be-

longed to the Cherokee Nation as a government and not as a representative of its citizens.

The Eastern and Emigrant Cherokees represented by Mrs. Belva A. Lockwood made no application for appeal.

Specification of Errors.

The court erred in awarding judgment in favor of the Cherokee Nation against the United States for—

Item 2. The sum of $1,111,284.70, with interest thereon at the rate of five per cent, from June 12, 1838, to date of payment.

2. The Court erred in refusing to award judgment in favor of the Eastern Cherokees against the United States for the said sum of $1,111,284.70, with interest thereon at the rate of five per cent from June 12, 1838, to date of payment.

3. The Court erred in decreeing the distribution of the said fund of $1,111,284.70, with interest, to be realized from its said judgment, among both Eastern and Western Cherokees.

4. The Court erred in directing that the Western Cherokees be permitted to share in the said fund of $1,111,284.70 with interest.

5. The Court erred in charging the said fund of $1,111,284.70 and interest, to be realized from its said judgment or decree, with the fees of the attorneys for the Cherokee Nation.

In support of the first and second assignments of error, to wit: That the court was in error in awarding a judgment or decree in favor of the Cherokee Nation against the United States as to item 2, and that the court was in error in refusing to award judgment in

favor of the Eastern Cherokees against the United States for the said sum of $1,111,284.70, with interest thereon, at the rate of five per cent per annum from June 12, 1838, to date of payment, it will be insisted that the amount constituting item 2 in the finding of the accountants is not in any sense due the Cherokee Nation either as a government or as a trustee for the Eastern Cherokees, or as trustee for any other or others of its citizens. That fund is directly the proceeds of the lands ceded in 1835 by the Eastern Cherokees to the United States, and under the decisions in the case of the Delaware Indians, of the Shawnee Indians, and of the Cherokee Freedmen, the Eastern Cherokees, upon the same principle laid down in those cases, are entitled to an exclusive recovery of this fund; that if the judgment of the Court of Claims is held to be a judgment in favor of the Cherokee Nation as a trustee, the court was clearly in error, because the Eastern Cherokees by act of Congress of March 3, 1903, were given the capacity to maintain the action for themselves as against the United States and against the Cherokee Nation; and also because the Cherokee Nation could not in the capacity as trustee or otherwise receive or disburse one dollar of the fund realized for the judgment upon Item 2, and being therefore incapable of discharging the duties of such trust cannot receive judgment. (Act of June 28, 1898, 30 Stat. 502, Sec. 19; Act of July 1, 1902, 32 Stat. 726.)

Moreover in an equity case no one but the equitable owner is entitled to the judgment. It is unreasonable to give judgment to an alleged trustee who denies his trust who is not claimant as trustee, whose legal capacity as trustee has been vacated by statute and where the court must immediately refuse the trustee the fund, because of its utter incapacity.

Even in case of the three items of the judgment, 1, 3, and 4, conceded to the Tribe the sums must go and does go to the United States as Trustee, the Tribe having no capacity to receive or conserve.

In support of the third and fourth assignments of error it will be insisted that the Western Cherokees, who by the judgment or decree are permitted to participate in the fund, have been heretofore, under the decision of the Supreme Court of the United States of April 3, 1893 (148 U. S., 427) paid a sum representing the balance due them for their proportionate interest in the lands ceded by the Eastern Cherokees from the sale of which the said fund of $1,111,281.70 is derived; and therefore that the sum agreed to be paid to the Eastern Cherokees for their interest in the said lands east of the Mississippi River ceded under the treaty of 1835-36, is not liable to deduction for payment the second time to the Western Cherokees of the value of the latter's interest in said lands; and, further, that the amount agreed to be paid by said treaty of 1835-36, was to be and is to be paid to the Eastern Cherokees without deduction for any purposes; and, finally, that the Western Cherokees not being a "claimant" this suit, cannot receive a judgment under the jurisdictional act.

In support of the fifth assignment of error it will be insisted that as the attorneys for the Cherokee Nation contracted with that nation to represent it and to claim the fund for itself as a government as against the Eastern Cherokees, and as said attorneys for the Cherokee Nation have complied with this agreement, and in the court below, and in this honorable court, have claimed this fund for the nation in its capacity as a government and have denied in express terms that the Cherokee Nation in securing the account-

ing under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees and for their exclusive use and benefit, and have further denied that if the Cherokee Nation had collected or shall hereafter collect such moneys, the sum would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise, (Rec. p. 40) the charge for compensation to these attorneys will be taken from a fund held in trust, if held at all, by the Cherokee Nation, for services rendered, not in support of the trust, but in denying the trust and opposing its establishment.

BRIEF OF ARGUMENT.

Signification of the Term "Cherokee Nation."

It is of the highest importance in considering this case to keep clearly in mind that the term "Cherokee Nation" has been used in various senses.

First, to represent the people themselves, as a tribe or Nation of Indians.

Second, the government of the Cherokees.

Third, the government as trustee for all of its people or for some of its people as their rights might appear under the treaties by which the rights of such communities within a community had been established.

In the treaty of July 2, 1791, the "Cherokee Nation" was described as "all the individuals composing the whole Cherokee Nation of Indians" (Article I.)

Thereafter the term "Cherokee Nation" was used interchangeably with the term "Cherokees" as having the same significance.

In the Treaty of 1835 these people are referred to (Revised Indian Treaties), as the "Cherokees" on pages

65, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76; as "The Cherokee Nation," on pages 65, 67, 68, 69, 70, 71, 72, 74, 75, etc. In the Treaty of 1846 they are referred to as "The Cherokee Nation" on pages 79, 80, 81, 82, 84; as "The Cherokee People," on pages 79, 80, 81, 82, 83; as "The Cherokees," on pages 81, 82, 83, 84, and 85.

It should be clearly remembered that the Cherokee Nation as a government has no property and never has had any property and never will have any property. The lands of the Cherokee Nation belong strictly to the "whole Cherokee people" by Article 1 of the Treaty of 1846. The lands which the Cherokees sold east of the Mississippi River belonged to the whole Cherokee people as then existing, as communal property. The western Cherokees were paid for their interest in such lands as communal owners upon a plan agreed to in Article 4 of the Treaty of 1846.

The communal interest in such lands of the Eastern Cherokees was to be paid for as provided in Article 9 of that treaty; the Western Cherokees have been fully paid (148 U. S., 427). The Eastern Cherokees are now seeking the balance of the purchase price due them under Article 9 of that treaty.

In the case of Whitmire vs. the United States (30 C. of Cls., 159), the court said:

"The United States have repeatedly recognized in their transactions with the Cherokees the dual character of the people, sometimes national, sometimes communal. They have also recognized portions of the people as distinct communities. In 1835 they so dealt with the Georgia Cherokees as communal owners, setting apart a portion of the purchase money for their lands for national purposes, but paying part to them per capita. In 1846 they so dealt with the Western Cherokees, segregating them from the mass of their countrymen and paying them individually, a community within a community."

See also

Eastern Cherokees *v.* The United States, 20 Ct. Cls., 449.
Western Cherokees *v.* U. S., 27 Ct. of Cls., 1, 53.
Blackfeather *v.* The U. S., 27 Ct. Cls., 447.
Journeycake *v.* U. S., 28 Ct. Cls., 281.

Chief Justice Nott in the opinion of the Court of Claims in the consolidated case now pending said (Rec., 53):

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate; and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration per capita. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs, and head men of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the Treaty of 1835, were equally interested, with the communal owners who were carried to

the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed per capita. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund; but their rights were inextricably woven with the rights and equities of the Cherokees, who were citizens of the nation; and the nation properly made no distinction when parting with the outlet, but demanded justice, from the Cherokee point of view, for all Cherokees who had been wronged by the non-fulfillment of the treaty of New Echota. As to these Eastern non-resident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the money awarded should be paid directly to the equitable owners."

The court thereupon refers to the present status of the Cherokee Nation that it is about to terminate and says (Rec., 55):

"In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person which should not be entrusted with the receipt and distribution of the moneys belonging to other persons."

By the Indian Appropriation Act of 1897 the Cherokee courts were dismantled and its executive department and legislative department practically vacated and destroyed in 1898. By the Act of June 28, 1898 (30 Stat. 502, Sec. 19), it was provided as follows:

"That no payment of any moneys, on any account whatever, shall hereafter be made by the United States to any of the tribal governments or any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction

of the Secretary of the Interior by an officer ap pointed by him; and per capita payments shall be mad e direct to each individual in lawful money of the United States; and the same shall not be liable to the p ayment of any previously contracted obligation."

Under the Act of July 1, 1902, known as the Cl herokee Allotment Act (32 Stat., 726), it was provided t hat the lands of the Cherokee Nation belonging to the Chero kee people should be allotted and (Sec. 64) th ereafter the Cherokee Nation as a body politic was forbi dden to collect a dollar of the Tribe's revenues, and th at what remained of the so-called "government" of the C herokee Nation should entirely cease March 3, 1906 (Se c. 63).

The fact is the Cherokee government was pra ctically abolished by Congress in 1898 (30 Stats., 83; 30 Stats., 502). They could not make laws except with t he consent of the Secretary of the Interior and the Pr esident nor enforce them when so made. Their judges an d court officials, their sheriffs and constables and guar ds and jails were vacated and nothing remained but the empty form of a so-called Chief and Council whose au thority had been destroyed by Act of Congress. In the current year, 1905, the Chief, so-called, d eclined to call an election for the council and th e last regularly elected council expired by limitation in Oc tober, 1905, so that this alleged body politic has n o judi cial department, no legislative department, and noth ing but a so-called Chief, a mere clerk, whose of fice ex pires March 3, 1906, and whose right to hold o ffice is being disputed at this time by proceedings in t he In terior Department. This is the dismembered body politic which demands judgment for itself as agai nst the Eastern Cherokees. This is the government (?) which denies its trust "to the Eastern Cherokees exclusively

or otherwise" if it should recover the fund in controversy. (Rec. 40.)

When Congress appropriated the moneys found due by the Auditor under Article 9 of the Treaty of 1846, the appropriation was made by Congress to the "Cherokee Nation" and not to the Eastern Cherokees in terms, although that was the real meaning of the Appropriation Act. The matter was submitted to the Attorney General of the United States and in his opinion of April 16, 1851 (5 Op. 320), Honorable John J. Crittenden held as follows:

> "The Cherokee Nation referred to under the acts approved September 30, 1850, and February 27, 1851, are the Cherokees described in the 9th Article of the Treaty of 1846, being all those Cherokees residing east at the date of the Treaty of 1835 and the supplement thereto.
>
> Paying per capita to the citizens of the Cherokee Nation is payment to the Nation, but payment to its national authorities may not be so."

When the Cherokee Nation received the money proceeds of the Cherokee Outlet in 1893, Congress did not permit that government to distribute such funds to one part of its citizens, Cherokees by blood, as against the Delawares, Shawnees and Freedmen, but authorized the courts to determine the rights of these communities within the community and the courts determined that the Delawares and Shawnees and Freedmen, as communal owners of the lands of the Cherokee Outlet, were entitled to the proceeds of the property owned by them. The Delawares, the Shawnees, the Freedmen and the Cherokees by blood were therefore paid a like distributive share of the proceeds of the sale of these lands.

The Cherokee government was not permitted to claim the fund as a government under this so-called Cherokee

agreement and contract of sale. It is true the contract of sale ran in the name of the Cherokee Nation. The contention, however, that the Cherokee Nation meant the Cherokee government which might exercise its discretion with regard to such fund or that the fund itself belonged to the Cherokee Nation as a government was settled by the courts adversely to such pretension in the Delaware, Shawnee and Freedmen cases. In this settlement by the courts the Cherokee Nation acquiesced, and has never since denied the proposition. Even with regard to the very fund in question the Cherokee National Council on December 7, 1900, in an Act of that date expressly conceded the right of the Eastern Cherokees to the fund now in question in the following language:

"Be it further enacted, that all moneys which may be collected belonging to the $5,000,000 treaty fund of 1835 shall be paid out per capita when collected to the persons entitled thereto, as set forth in the 9th Article of the Treaty of 1846." (Rec. 40, §4.)

This act [filed in the Court of Claims, Congressional Case, 10386, and being of record in the Interior Department], while recognizing the right of the Eastern Cherokees, was objected to by them, in formal protests to the President of the United States, on the ground that the Eastern Cherokees had already organized in their own behalf and employed counsel and that the contract to employ Turner and Halsell as proposed by such act was wasteful. The President disapproved the act. The act of December 7, 1900, above referred to, was approved on that day by Hon. T. M. Buffington, Principal Chief of the Cherokee Nation. Notwithstanding his approval of this act with its recognition of the rights of the Eastern Cherokees he there-

after employed counsel to deny the right of the Eastern Cherokees and to claim the fund for the Cherokee Nation as a government, denying that the Cherokee Nation, if it should recover such fund would hold the same as an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise (Rec., 40, last paragraph).

When the Delawares, Shawnees and Freedmen recovered from the Cherokee Nation their proportionate part of the purchase price of the Cherokee Outlet, it was on the principle that they were communal owners of the land of which the fund was the proceeds. When the Western Cherokees recovered judgment in 1903 (148, U. S. 427), it was on the principle that the fund was the proceeds of the sale of their communal interest in the lands East of the Mississippi River. The Eastern Cherokees now seek to recover on the same principle, that the fund found due, as the balance under Article 9 of the Treaty of 1846, is the true balance of proceeds of the sale of their communal interests in the lands east of the Mississippi River pledged to them per capita in express terms by Art. 15, Treaty 1835-36 and by Art. 9, Treaty 1846.

The Interpretation of Indian Treaties.

Upon a fair interpretation of the Cherokee agreement of December 19, 1891, ratified by Congress March 3, 1893, the Eastern Cherokees are entitled to a recovery, because the fund claimed was found due in the account rendered as the balance guaranteed them per capita under the 9th Article of the Treaty of 1846 and the United States agreed to pay immediately the sum so found due.

The Eastern Cherokees are entitled to recover the amount claimed by them upon a fair interpretation of

the treaties of 1835-36 and 1846, even if there had been no sale of the Cherokee Outlet and even if there had been no account rendered.

It is conceded by the United States that if the purchase price of $5,000,000 promised the Eastern Cherokees for their lands and possessions east of the Mississippi River, is not chargeable with the cost of removal, then the United States is indebted in the sum now in controversy, to-wit, $1,111,281.70.

The controversy, therefore, turns upon the question as to whether or not the $5,000,000 fund was chargeable with the cost of removal expenses. Before entering upon this question we desire to call attention to the rules laid down by the Supreme Court in regard to the interpretation of Indian Treaties.

In Worcester *v.* Georgia, it was said—

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense * * *.

"How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." (6 Pet. 582.)

In the case of the Kansas Indians (5th Wallace, 737) the following principle was laid down:

Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence a provision in an Indian treaty which exempts their land from 'levy, sale, and forfeiture,' is not in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but it is to be extended to levy and sale by county officers also for non payment of taxes.

In the case of the Cherokee Nation against Georgia, some four years before the treaty of 1835, in speaking of the controversy between the Cherokee Nation and the State of Georgia, the Supreme Court by Chief Justice Marshall said—

"If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence."

"To preserve this remnant the present application is made" * * *

"They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relations to the United States resembles that of a ward to his guardian.

"They look to our government for protection, rely upon its kindness and its power, appeal to it for relief for their wants, and address the President as their 'Great Father.'" (5 Peters 1.)

In the case of Jones *v.* Meehan (175 U. S., 10) Justice Gray delivered the opinion of the court and said:

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of

a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed, is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

(See also Choctaw Nation *v.* U. S., 119 U. S., 1, 27, 28).

Justice Peelle has said in this case referring to the principles of interpretation above set forth:

"And such has been the holding of our courts in dealing with the Indian tribes ever since. And especially should this rule prevail where the Indians sign a treaty by mark, as they did in the treaty of 1835, and when the terms of the treaty were made known to them only by the oral interpretation of an interpreter."

The United States Indebted Under the Cherokee Agreement of December 19, 1891.

When the United States established the Territory of Oklahoma it became necessary to extinguish the Indian title to the lands within the boundaries of that Territory. A commission was appointed by authority of Congress, to-wit: David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, who were charged with the duty of negotiating the necessary agreements with the Indian owners. In 1890 the Cherokees refused to sell the Cherokee Outlet because they never had been paid the

full purchase price of the lands they had sold the United States east of the Mississippi. Moreover they were unwilling to sell the lands in the Cherokee Outlet at all because it would only leave them a small allotment of about 80 acres of average land per capita and because the United States offered them a price which they regarded as inadequate. The officers of the United States, however, brought pressure to bear upon the Cherokees very ingeniously. A judicial decision from a local court was rendered that the Cherokees merely had an easement in the lands of the Outlet, the very land President Jackson had pledged them in fee simple, and for which the United States in Article 1 of the treaty of 1846 had pledged them the title and promised a patent, a patent never delivered. The United States Commissioners pointed out to the Cherokees that the United States had a right under the treaty of 1866 to move other Indians into their country. The Cherokees knew the Commissioners were negotiating with the wild tribes in Oklahoma and they were afraid that the United States might take advantage of them by moving strange Indians into their country. The Cherokees were very desirous that the United States relieve them of white trespassers, and, also, recognize the Cherokee courts as having exclusive jurisdiction over all Cherokee citizens.

Under the insistence of the United States Commissioners they finally agreed Dec. 19, 1891, to sell the Outlet, which embraced 8,144,682.91 acres, for six considerations, to wit:

First. That the United States would remove certain described trespassers.

Second. That the Article of the Treaty of 1866 permitting the settlement of other Indians in the Cherokee country should be abrogated.

Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction where Cherokees alone were concerned.

Fourth. That—

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall, at its next session, after such case, shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting." (Rec. 103.)

Fifth. That certain citizens of the Cherokee Nation should have the right to select lands on the Outlet as homesteads under certain conditions;

Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States should pay the Cherokee Nation, at such times and in such manner as the Cherokee National Council should determine, the sum of $8,595,736.12 in excess of the sum of $728,380.46, the aggregate of amounts theretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River. The Cherokees ratified the agreement January 4, 1892. Congress ratified the same March 3, 1893 (27 Stats., 640).

Chief Justice Nott, in speaking of this negotiation, in the opinion of the Court of Claims, said:

"At the time of this negotiation the Cherokees had a grievance against the United States—a grievance which had burned in the breasts of two generations, and had never been forgiven or forgotten. That grievance was the Treaty of 1835, commonly known as the Treaty of New Echota—the corrupt methods by which it had been procured, the ruthless means by which it had been executed, and the evasive way in which its obligations had been left unfulfilled." (Rec., 44.)

The Cherokees therefore demanded as a **condition precedent** that the account above referred to should be correctly made up and settled in the manner set forth in the Fourth subdivision of Article II of the Cherokee agreement.

Prior to the acceptance and ratification of said agreement on the part of the United States the Commissioners Jerome, Wilson and Sayre made their report to the President, as required by the law under which they were appointed, and explained the reasons why they had agreed that the United States should state the account and the purpose of it, as follows to wit:

"As to the conditions of the agreement, besides the relinquishment of the title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

"The accounting provided for in the fourth subdivision of Article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

"Whatever that construction is, the Indian must abide by it. There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting, upon a proper construction of the treaties named, a large sum of money, **principal and interest,** will be found due them. They also desired to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected." (Rec. 104.)

The Commissioner of Indian Affairs, Hon. Thomas J. Morgan, in his report to the Secretary of the Interior of February 6, 1892, quotes the exact language of the commissioners, thus:—

"The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for the legal discharge of the old ones. (Rec. 105)

He says:

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it."

The Assistant Attorney General of the Interior Department gave the matter his approval and said that:

"It seems right, and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting." (Rec. 106.)

Thereupon Congress ratified the agreement and provided that:

The provisions of said agreement so amended shall be fully performed and carried out on the part of the United States. (Rec. 106 §7.)

The Congress thereupon threw open the lands of the Cherokee Outlet to settlement. These lands are worth, at a very moderate estimate, not less than sixty millions of dollars.

Congress, at the same time, on March 3, 1893, provided for rendering the account through experts to be employed by the Secretary of the Interior. The Secretary appointed James A. Slade and Joseph T. Bender as expert accountants to make up such account. They completed their labors in about fourteen months and rendered the account, on April 28, 1894. The Secretary of the Interior rendered the account to the Cherokee Nation May 21, 1894, in the manner and form agreed on.

The Cherokee national council accepted it December 1, 1894. (Rec. 51.)

This account allowed the Cherokee Nation "three items of trifling amount," which the United States con-

ceded, and disallowed numerous items which the Cherokee Nation claimed; and on the great and important subject in dispute—the Treaty of New Echota—it found a balance of $1,111,284.70, and allowed interest upon this balance from June 12, 1838. (Rec. 47, 109.)

On January 7, 1895, the Secretary of the Interior submitted the account rendered to the Congress of the United States for payment, describing it as:

"A complete account of moneys due the Cherokee Nation under any of the Treaties made in the years 1817, 1819, 1825, 1835-36, 1846, 1866 and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect, prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of the Cherokee national council accepting such accounting." (Rec. 107.)

This is the money now sued for.

The Court of Claims has heretofore found as a fact (Congressional 10,386) as follows:

10. The accounting as thus stated by Messrs Slade & Bender was rendered to the Cherokee Nation and duly accepted by act of their national council in the manner and form provided in the agreement. (Sen. Doc. 334, 57 Cong. 1st Sess. p. 7. Finding X.)

If ever there was a plain, unequivocal contract, we have it in this agreement.

The United States bought a property from the Cherokees of immense value. They agreed as one of the important considerations by which the Cherokees were induced to make the contract of sale, that the United States would render a complete account of moneys due under any of the treaties with the Cherokees from 1817 to 1868. The United States under this agreement was to render an account using its own instrumentali-

ties. It was understood by the Cherokees that the scope of this accounting was to include the various treaties and laws relating thereto and that a proper accounting should be rendered of the moneys due under those treaties and under a proper construction of those treaties. They complained that these treaties had been improperly construed in the past by the accounting officers of the Government and this accounting was intended by both parties to remedy the injustice complained of by the Cherokees.

The United States appointed expert accountants and by means of its own instrumentalities and its own officers rendered the account. The United States never thereafter objected to the accuracy of the accounting. The United States reserved to itself no right to object to its own accounting in the said Cherokee agreement, but specifically agreed that if it should be found upon its own accounting, to be rendered by its own officers and in its own way, that there had been any sum promised but withheld from the Cherokees under any of the treaties named, the United States would immediately pay it.

The accounting rendered by the United States is one of the most comprehensive, logical and able reports that ever issued from any Department of the Government. It sets forth with the utmost precision the exact terms of the treaties, the exact language of the various officers of the War Department and all the other branches of the Government, and shows the correctness of such account in a manner that can leave not the slightest doubt in the mind of any man, learned or unlearned, as to the correctness of such account. (H. R. Ex. Doc. 182 53rd Cong. 3rd Sess.)

In this report it was not necessary to construe the

law or the treaties, because both the treaties and the laws had been construed by the highest law officers of the Government, and it was only necessary in the making of such accounting to apply the laws as they had been construed by the Attorneys General of the United States. (3 op. 297., 3 op. 304., 4 op. 73., 5 op. 320.)

There assuredly can be not the slightest doubt that the Cherokees understood by the Cherokee agreement and Article 4 of the Second Section thereof that the United States would pay the amount found due by its own accounting. The United States contracted directly and plainly that they would pay the amount found due by their own accounting and, as the Indians understood the agreement, so must the rule of construction be, under the principles laid down by this Honorable Court.

Worcester *v.* Georgia, 6 Pet., 582.
Kansas Indians, 5 Wall., 737.
Jones *v.* Meehan, 175 U. S., 10.

The Court of Claims in the cases now pending (Rec., 49), said:

"It must be conceded that the scope of the accounting was intended to be as broad as the causes of action secured by the agreement to the Cherokee Nation 'The right within twelve months to enter suit against the United States in the Court of Claims for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting.' That is to say, the Court, or the accountants were to go behind statutory and treaty bars and receipts in full and were to consider 'any alleged or declared amount of money promised but withheld' 'under any of said treaties or laws.' This meant that there were to be no technical defenses set

up, no pleas of res adjudicata, no releases or relinquishments, compromises or settlements, or it meant nothing."

The case in controversy is simply one to recover the consideration pledged the Cherokees upon a contract of sale. The Eastern Cherokees as communal owners of the Outlet would not have permitted this sale to be made by the Cherokee Government, of which they had control by reason of their overwhelming numbers, except for the promise of the United States to render a complete account of moneys due the Cherokees under the various treaties and to pay the amount found due them, or in the alternative, permit the Cherokees to bring suit against the United States, if they were not satisfied with the accounting.

The accounting was merely a means to the end. When the account was rendered by the United States in the manner and form agreed on, the indebtedness of the United States was an ascertained and fixed amount. It was due, first, as a consideration moving the Cherokees to the making of the contract of sale of the Cherokee Outlet; it was, as the commissioners explained, a "condition precedent" to the making of the sale at all; but the fund was due the Eastern Cherokees really as the purchase price of their lands east of the Mississippi River, which never had been paid in full and it was due the Eastern Cherokees regardless of the sale of the Cherokee Outlet.

In the opinion of the Court of Claims in this case Chief Justice Nott said:

"No agreement could have made the obligation to pay promptly more unequivocal and specific." * * *

"The accountants were but the instrumentality of the United States in making out an account. When it was

placed in the Interior Department it was as much within the discretion of the Secretary to accept or adopt it, or to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made and he was the authority under which the account had been made out; and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States." (Rec., 51.)

"The Secretary did not recall the account; the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time in which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament; and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement." (Rec., 51.)

The amount found due by the accounting rendered by the United States under the Cherokees agreement is due as one of the considerations agreed to be paid by the United States for the making of that agreement and as a consideration pledged by the United States under the provisions of a present valid binding contract.

The United States greatly desired to acquire what the Cherokees owned. The Cherokees refused to sell except upon the making of this account and the paying of any amount found due by such account when rendered. The Cherokees demanded as a condition

precedent that the United States should render the account and pay the amount found due. The United States agreed to do this.

The Cherokees gave up the lands which belonged to them in pursuance of this agreement. The United States appropriated the land and retains it. The Government rendered the account as agreed, the Cherokees accepted it as provided, and it is impossible to present a stronger case of a present valid binding contract. Not to pay the money so found due would violate the canons of common honesty. To refuse payment would be nothing short of the repudiation of an ascertained debt about which there is no question.

In making Cherokee Agreement of December 19, 1891 Cherokee Nation, acted as the Representative of its Citizens.

When the Cherokee Nation required a statement of the amount due its citizens under the various treaties referred to in the Cherokee agreement, it acted as the representative of such citizens as their rights might appear under the various treaties. The Eastern Cherokees naturally and in accordance with a long established custom, were represented by the government of the Cherokee Nation as the instrumentality for dealing with the United States. It should be remembered that the Cherokee Nation as a government owns no lands and no funds derived from the sale of lands. The lands and the funds derived therefrom are the communal property of the Cherokee citizens. (Rec. 52, §2.)

The Cherokee Nation, in receiving the cash consideration of the outlet received it only as the representative of the owners of the lands of the outlet, that is,

for the citizens of the Cherokee Nation, including not only Eastern and Western Cherokees and their descendants, but the Delawares who had been adopted by the Delaware agreement of 1867, the Shawnees who were adopted by the Shawnee agreement of 1869, and the Freedmen who were adopted by the Treaty of 1866.

It is true that the Cherokee Nation as a government attempted to deprive the Delawares, the Shawnees and the freedmen of their proportionate part of the proceeds of the lands of the outlet, but the Congress of the United States and the courts required the proceeds of the outlet to be distributed by the United States to all such citizens of the Cherokee Nation as communal owners of the land from which this cash consideration was derived.

Blackfeather *v.* U. S., 27 Ct. Cls., 447 (175 U. S., 218).
Journeycake *v.* U. S., 28 Ct. Cls., 281 (155 U. S., 196).
Whitmire *v.* U. S., 30 Ct. Cls., 159.

The same principle was recognized by the Court of Claims in the case of the Western Cherokees against the United States (27 Ct. Cls., pages 1 and 53), and in the case of the United States against the Old Settlers (148 U. S., 427), wherein the Western Cherokees were given judgment for the proceeds of the sale of their interest in the lands east of the Mississippi under Article 4 of the Treaty of 1846.

The Eastern Cherokees rely upon the same principle which has controlled in these other cases and demand the sum of $1,111,284.70 as the balance due them under the 9th Article of the Treaty of 1846, and as the remuneration promised them as the purchase price of their communal interest in the lands east of the Mississippi.

The United States Indebted to the Eastern Cherokees Under the Treaties of 1835-36 and 1846, Regardless of the Cherokee Agreement of December 19, 1891.

When the United States acquired the lands known as the Louisiana Purchase from France in 1803 they agreed with Georgia that they would, as soon as practicable, remove the Cherokees from the State. This policy was pursued thereafter until 1838. Negotiations were in progress from time to time urging the Indians to remove from the East to the West, not only the Cherokees but also the Choctaws, the Chickasaws, Creeks and Seminoles.

It was the fixed policy of the United States to pay the cost of the removal of these Indians from the East to the West and to support them for a period of one year after they reached the Western country as shown by the treaties with the Choctaws in 1820 (7 Stats., 210), with the Creeks in 1826 (7 Stats., 381), with the Seminoles in 1832 (7 Stats., 368), with the Delawares and Shawnees in 1829 and 1832 (7 Stats., 327 and 397).

Did the Cherokees understand that the expense of Removal was Chargeable to the $5,000,000 Fund.

The determining question in this controversy is, did the Cherokees understand that the $5,000,000 fund was chargeable with the cost of their removal expense.

Certainly, the Cherokees knew of the general policy of the Government to pay removal expenses in dealing with the adjacent tribes, the Creeks, Seminoles, Choctaws and Chickasaws, Delawares and Shawnees.

The Treaty of 1828 Agrees to Pay Expense of Removal and Subsistence of Eastern Cherokees.

On May 6, 1828, the United States contracted with the Western Cherokees, Article 8 (Rec., 83), as follows (italics our own):

"Article 8. The Cherokee Nation, west of the Mississippi, having by this agreement freed themselves from the harrassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and to their posterity, under the solemn sanction of the guaranty of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the States may be induced to join them and to enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now remaining within the chartered limits of Georgia, or of either of the States east of the Mississippi, who may desire to remove West, shall be given, on enrolling himself for emigration a good rifle, a blanket and kettle, and five pounds of tobacco (and to each member of his family one blanket), also a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. *The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation and support by the way, and provisions for twelve months after their arrival at the Agency;* and to each person, or head of family, if he take along with him four persons, shall be paid immediately on his arriving at the Agency and reporting himself and his family or followers, as emigrants and permanent settlers, in addition to the above, provided he and they shall have emigrated from within the chartered limits of the State of Georgia, *the sum of* $50.00, and this sum in proportion to any

greater or less number that may accompany him from within the aforesaid chartered limits of the State of Georgia."

Under this treaty various Eastern Cherokees were leaving [during 1828, 1829, 1830, 1831, 1832, 1833, 1834, and 1835] the Eastern Cherokee country for the West, joining the Western Cherokees, the United States paying the "removal and subsistence" as agreed, it being generally understood by the Indians that the United States would be glad to pay the expense of removal and subsistence of all who would go. These removals at government expense fixed the understanding of the Cherokees.

The great body of the Eastern Cherokees, however, were firmly resolved not to leave their cultivated fields and improvements worth $1,700,144.39 on actual valuation (Rec. 102). They were resolved not to leave the country they loved, where their childhood had been spent, whose hills and valleys were dear to them, a country where they had buried their dead and for which they had the intense affection which has always characterized the Indian. As a matter of common sense, how could these Indian people imagine that they would be expected to pay the expense of removing to the West, a thing to which they were violently opposed? Why should they pay the expense out of their own funds for doing what the United States greatly desired and which was of great political importance to the United States but which was extremely obnoxious to the Cherokees? To pay for their forced removal from homes they did not wish to leave, to go to a country to which they did not wish to go certainly was not agreed to by the Cherokees. The theory is utterly unreasonable.

In the accounting rendered by the United States

April 28, 1894, the expert accountants call attention to the following express proposals by the United States to pay the cost of removal, to-wit:

"In September, 1830, Colonel John Lowry made a proposition to them in behalf of the United States, in which the United States agreed to remove the Cherokees and subsist them one year after their arrival west."

"In April, 1832, Mr. E. W. Chester, in the same behalf, made another proposition under which the United States was to remove the Cherokees to their new country and pay the expense of such removal and also provide them with subsistence for one year after removal."

"In September, 1832, Governor Lumpkin, of Georgia, in the same behalf, made the Cherokees a proposition substantially similar to that of Mr. Chester."

"June 19, 1834, a treaty was made between John H. Eaton, on the part of the United States, and Andrew Ross, and others, on the part of the Cherokee Nation. This treaty was rejected by the Senate, the Cherokee Nation protesting against its ratification. In this treaty appears the following clause, respecting removal and subsistence:

"Fourthly. To cause emigrants to be carried to their homes under the guidance of some faithful conductors at the expense of the United States, and they are furthermore, to be furnished with the means of living for twelve months after their arrival." (H. R. Ex. Doc. 182, 53 Cong., 3 Sess.) Ex. 1. A. 19.

The Award of March 5, 1835 of U. S. Senate.

On March 5, 1835, the Senate of the United States, acting as umpire, upon the suggestion of the War Department, made an "award" in favor of the Cherokees in the form of a resolution advising:

"That a sum not exceeding $5,000,000 be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River."

John Ross, the Cherokee Chief, bitterly complained of this award on the ground that the Cherokee authorities were not heard in regard to it and that the Senate had been grossly misled by the representation and suggestions of certain unauthorized Cherokee citizens unduly influenced by officers of the Government. The Cherokees valued their country at $20,000,000.

Rev. J. H. Schermerhorn, a commissioner appointed to make a treaty with the Cherokees, immediately drew up a proposed treaty on March 14, 1835, in which in Article 9 it was proposed as follows:

"The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after arrival there, and that a sufficient number of steam boats and baggage wagons shall be furnished them to remove them comfortably, and so as not to endanger their health; and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the government. They shall also be furnished with blankets, kettles and rifles as stipulated in Treaty of 1828. * * * And in order to encourage immediate removal and with the view of benefitting the poorer class of their people the United States agree and promise to pay each member of the Cherokee Nation $150.00 on his removal, at the Cherokee Agency West, provided they enroll and remove within one year from ratification of this treaty; and $100.00 to each person that removes within two years." (Ibid.) 4/1 f 20,

This proposal provided for the payment of $4,500,000, with an additional quantity of land west, valued at $500,000, making a total payment of $5,000,000, from which certain estimated expenses for removal, subsistence, improvements, and ferries, and other expenditures were to be deducted. Forming a part of Article 18 is the following schedule containing the estimate for

carrying into effect the several stipulations of the treaty:

For removal	$255,000.00
Subsistence	400,000.00
Improvements and ferries	1,000,000.00
Claims and spoliations	250,000.00
National debts	60,000.00
Domestic animals	10,000.00
Public buildings	30,000.00
Printing press	5,000.00
Blankets	36,000.00
Rifles	37,000.00
Kettles	7,000.00
Per capita allowance	1,800,000.00
General fund	400,000.00
School fund	160,000.00
Orphans' fund	50,000.00
Additional territory	500,000.00
Total	$5,000,000.00

(Ibid 15.)

President Jackson's Letter October 23, 1835.

This proposal was submitted to the Cherokee people at a general Council at Red Clay on the 20th day of October, 1835. A letter from President Jackson explanatory therof was read and translated to the Council, in which he said:

"I shall, in the course of a short time, appoint commissioners for the purpose of meeting the whole body of your people in Council. They will explain to you more fully my views in the matter of the stipulations which are offered to you. These stipulations provide:

"First, for an addition to the country already assigned to you west of the Mississippi and for the conveyance of the whole of it, by patent in fee simple. And also for the security of the necessary political rights, and

for preventing white persons from trespassing upon you.

"Second. For the payment of the full value to each individual for his possessions in Georgia, Alabama, North Carolina and Tennessee.

"Third. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of $150.00 to each person, etc." (Sen. Doc. 215, 56 Cong., 1st Ses., 82.)

The proposed treaty was nevertheless unanimously rejected by the Cherokee National Council. Even those who had agreed to treat refused this proposition of Schermerhorn to charge the Cherokees with a part of the expense of removal. (Rec., 85.)

At the time of the rejection of this proposed treaty John Ross and the Cherokee authorities, insisted that their country was worth at least $20,000,000, the country itself being splendidly adapted for agriculture, finely watered, with splendid timber and inexhaustible quantities of marble, iron and other minerals, and at that time also being regarded with great excitement on account of the gold diggings which had been found in a number of places. (Sen. Doc. 120, 25 Con., 2d Ses., 494. History Cherokee Indians, Bureau of Ethnology 378. H. R. Ex. Doc. 286, 24th Cong., 1 Ses., 13.) The country contained 7,882,240 acres.

The Cherokee title was recognized by the Supreme Court. (5 Peters, 1 and 6 Peters, 516.)

Treaty of December 29, 1835.

Immediately that Mr. Schermerhorn failed in carrying out the treaty, he wrote the Commissioner of Indian Affairs, October 27, 1835 (Sen. Doc. 120, 25 Con., 2d Ses., p. 484):

"The only hope I have of accomplishing it now is the

fear of the Indians of Georgia legislation. Alabama and Tennessee, I think, will also pass some wholesome laws to quicken their movements."

The cruelly oppressive laws passed by Georgia over the Cherokees, in defiance of Federal Treaty and this court is fully set out in Cherokee Nation *v.* Georgia (5 Pet. 1, 6 Pet. 516.)

President Jackson instructed Schermerhorn not to use unfair means. But Schermerhorn not only used the legislatures of the adjacent States to violate the pledges of the Federal Government to these Indians, but he told the Indians themselves that their country had:

"Already been virtually sold by the Chiefs." (Sen. Doc. 120, 25 Cong. 2d Ses., 461.)

Schermerhorn immediately disobeyed the President and bribed the Indians by promises of blankets and other benefits, and persuaded them to attend a mass meeting at New Echota where he secured the signatures or marks of twenty Cherokees to the so-called Treaty of December 29, 1835. Mr. Schermerhorn, on December 31, 1835, made the following report:

"The whole of the expenditures since I have been in the Nation negotiating, not including my own services, etc., or that of the Secretary, amounting to about $3,000; and I believe all the accounts are in and settled up to this day, having made myself personally responsible to the disbursing agent for all advances above the money in his hands, for this service." (Sen. Doc. 120, 25 Cong., 2d Ses., p. 496.)

Mr. Schermerhorn made this false report when, as a matter of fact, he had contracted to pay every man who signed his pretended treaty sums ranging from $1,200 to $2,760 for their "services and expenses" in negotiat-

ing and concluding the Treaty of 29th December, 1835, amounting to over $30,000 as follows, to wit:

J. Star	$1,681.00	W. Rogers	1,310.00
A. Ross	2,760.00	R. Sanders	1,200.00
J. A. Foreman	1,315.00	Tayeskey	1,200.00
J. Gunter	1,315.00	J. Foster	1,200.00
Longshell Turtle	1,315.00	J. Fields	1,300.00
J. Rogers	2,175.00	M. Ridge	1,280.00
John Smith	2,175.00	G. Welch	1,200.00
W. Coody	1,407.00	J. Ridge	2,054.87
E. Boudinot	1,550.00	S. Watie	1,200.00
J. Bell	1,200.00		

Schermerhorn acted personally as attorney for Boudinot, Bell, Tayeskey, Foster, Fields, M. Ridge, G. Welch, J. Ridge, S. Watie, J. Fields, and he received for them over $16,000. (Ibid. 1034.)

The error of these poor Cherokees led to their immediate outlawry and to the bloody assassination of many of them.

In extenuation of their error it should be remembered that the oppression of the laws of Georgia was driving the unhappy Cherokees to desperation and those who favored making a treaty and moving West had grounds to believe it was best for the Cherokees to yield when the United States refused to protect them in their guaranteed treaty rights.

The history of this corrupt transaction is set forth in the Western Cherokee case by the Court of Claims, vol. 27, pp. 20-30, and in Senate Doc. 392, 56th Cong., 1st Ses., pp. 5-10.

On the 3d of February, 1836, the General Council of the Cherokee Nation, the Eastern Cherokees, unanimously adopted a resolution setting forth:

"That having been informed that certain individuals of the Cherokee Nation, after having organized them-

selves into a body and calling themselves a General Council, did, on the 28th or 29th of December last, at New Echota, enter into an agreement or treaty with John F. Schermerhorn, Commissioner on the part of the United States, ceding away the entire land of the Cherokee Nation east of the Mississippi to the United States, contrary to the known will and declaration of a large majority of the Cherokee people and without any authority whatever from the authorities and people of the Cherokee Nation so to act."

Wherefore the resolution proceeds:

"We do most solemnly protest before God and man and of its ratification by the Senate of the United States that we are determined never to acknowledge any acts of individuals without authority to treat away the most sacred rights and the dearest interest of the Cherokee people."

The Court of Claims has held as a finding of fact in regard to this treaty of New Echota as follows:

"Neither the 'Western Cherokees' or 'Old Settlers,' nor the great body of the 'Eastern Cherokees' were parties to this treaty, and they at all times up to the making of the Treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in Council." (Rec. 93.)

Western Cherokee *v.* U. S.

Immediately after the treaty had been framed and before it had been submitted to the Senate some of the men who were bribed to sign it discovered that Article 15 of that treaty included the expense of removal as a deduction from the five million fund and they immediately protested that they had not so understood the treaty.

It should be remembered, in considering this claim made by them, that Schermerhorn was corrupt, that he was determined to make a treaty at all hazards, that

the interpreter who was in his employ might easily have omitted the word "removal" and it might easily happen that Schermerhorn, being corrupt, in reading Article 15 could have read it so as to omit the word "removal." It might easily have happened that Schermerhorn, being corrupt, might have left a blank space in Article 15 where the word "removal" might be thereafter inserted in the same handwriting. 7 U. S. Statutes has a note, referring to this treaty, that these Indians signed this treaty by mark, and it would not be surprising if advantage might have been taken of them in the particular named. At all events they immediately insisted that they understood that removal expenses were not to be deducted from the five million fund and they were confirmed in their opinion by various authorities.

Senator Cuthbert and other Senators who voted for the ratification of the treaty, wrote the following letter to the President of the United States:

"February 29, 1836.

"We have no hesitation in stating it to be our impression, sir, that the Senate of the United States did not intend that the allowance for spoliation or the expenses of removal should be deducted from the amount of five millions recommended to be offered to the Cherokees as the price of their property. It is also our confident opinion that the Senate will readily add six hundren thousand dollars to the sum of five million to meet these two expenditures.

"With the greatest respect, &c."

"To the President of the United States."

(H. R. Ex. Doc. 182, 53 Cong., 3 Ses. 17.) 41, p. 11,

The War Department, through its Commissioner Schermerhorn, estimated:

The cost of removals at	$255,000
And for claims and spoliations	250,000
Aggregating	$505,000
This would leave for school purposes	95,000
Out of the	$600,000

which was by the supplementary articles agreed on.

It should be remembered that when this treaty was ratified there was no intention to remove the entire Cherokee people. The policy of removing all the people was only determined on after the conflict between the government and the Cherokee Indians had progressed nearly two years.

Decision of Senate in 1836 on Removal Expenses.

The President of the United States, evidently believing that the Cherokees were justified in their contention that the purchase price of the land, the five millions, was not to be charged with the expense of removal, drew up and submitted four supplementary articles which were submitted to the Senate with the Treaty March 1, 1836.

Article 1 relinquished certain preemption rights and reservations. Articles 2 and 3 are as follows:

"Article 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States,

which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question; and whereas the President is willing that this subject should be referred to the Senate for their consideration and if it was not intended by the Senate that the above mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provision should be made therefor as might appear to the Senate to be just.

"Article 3. It is therefore agreed that the sum of six hundred thousand dollars shall be and the same is hereby allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the reservations and preemptions and of the sum of three hundred thousand dollars for spoliations described in the 1st Article of the above mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after the removal and payment of the claims so ascertained shall be turned over and belong to the education fund." (7 Stat. L., 488.) (Rec. 87.)

It is perfectly obvious that the treaty making Indians understood that the five million fund should not be charged with the cost of removal.

It is equally plain that the Senate of the United States understood that the five million fund was not to be charged with the expense of removal. It was only **"in that case"** that the Senate was to make "such further provision" for removal expenses "as might appear to the Senate to be just."

The Senate thought it just to appropriate six hundred thousand dollars, an amount estimated as more than sufficient to pay the entire cost of removal. If the Sen-

ate thought it just to pay the entire cost of removal and if they made provision to pay the entire cost of removal on the theory that the five million fund was not chargeable with the expense of removal who shall be heard to construe the treaty to mean the exact contrary of what the Senate declared as its intention and what the Indians declared to be their understanding?

Nothing could be more convincing as to the intention of the parties than this construction put upon the treaty before its ratification and with this construction written into the treaty as the last expression of the legislative will in the supplementary articles. The treaty with these supplementary articles was ratified by the Senate May 18, 1836, and proclaimed May 23, 1836.

Long afterwards, on June 14, 1848, the Senate of the United States was discussing the history of this treaty and the Senators of Tennessee, of North Carolina, and of South Carolina, the States immediately concerned in the Cherokee removal, explained its meaning. Senator Bell of Tennessee, (Cong. Globe, p. 840) said that the Senate had determined that the cost of removal should not be deducted from the five million dollar fund; that by making an additional appropriation for the cost of removal and subsistence, the Government of the United States admitted that this expense was not to be taken out of the five million dollar fund; that in addition to this the Government had pledged itself two years after the ratification of the treaty to pay the whole expense of removal and subsistence; that the claim of the Cherokees that the Government was chargeable with the entire cost of removal and subsistence was equitable.

Senator Willie P. Mangum representing North Carolina, acquiesced in the exposition of Senator Bell as conclusive. He stated that the vote on the ratification was

30 to 15, actually a majority of one under the two-thirds rule. He had been induced to give his vote for the ratification, which he did very reluctantly knowing that it could not be ratified without his vote, and he would never have given his vote for it had he not been satisfied that the true construction was that which had been given by the Senator from Tennessee. That he had voted for the treaty to save the Cherokees from the sword of Georgia.

Senator John C. Calhoun recollected the circumstances attending the ratification of the treaty generally, although he did not remember the particular incident alluded to by Senator Mangum but he had no doubt of the entire correctness of it. He had never regarded the treaty as a treaty at all.

Congress Confirms Decision of Senate on Question of Removal Expense July 2, 1836.

On July 2, 1836, the Congress of the United States sanctioned and confirmed the construction of the United States Senate that removal expenses should be paid from the Treasury of the United States and not from the five million fund by passing the following appropriation act:

"For the removal of the Cherokees and for spoliation according to the 3rd Article of the supplimentary treaty with the Cherokees, of the first of March, one thousand eight hundred and thirty-six, six hundred thousand dollars." (5 Stats. 73.)

On July 2, 1836, the Congress of the United States appropriated the five millions of dollars pledged to the Cherokees for their "lands and possessions" in the following act:

"For the amount stipulated to be paid for the lands

ceded in the first Article of the Treaty with the Cherokees of the twenty-ninth of December, one thousand eight hundred and thirty-five, deducting the cost of the land to be provided for them west of the Mississippi, out of the second Article of said Treaty four million five hundred thousand dollars." (5 Stats. 73.)

From 1836 to 1838.

The Eastern Cherokees vigorously protested against the execution of the so-called treaty of 1835. They were not parties to it and did not believe that the United States would attempt to carry it out.

On March 5, 1836, Major William M. Davis, an agent of the War Department in the Cherokee country, made the following report to the Secretary of War:

"I conceive that my duty to the President, to yourself, and to my country reluctantly compels me to make a statement in relation to a meeting of a small number of Cherokees at Echota last December who were met by Mr. Schermerhorn and articles of a general treaty entered into between them for the whole Cherokee Nation * * *.

"I should not interpose in the matter at all, but I discover that you do not receive impartial information on the subject; that you have to depend upon the ex parte, partial, and interested reports of a person who will not give you the truth. I will not be silent when I see that you are about to be imposed on by gross and base betrayal of the high trust reposed in Rev. J. F. Schermerhorn by you * * *.

"Sir, that paper * * * called a treaty is no treaty at all because not sanctioned by the great body of the Cherokees and made without their participation or assent. I solemnly declare to you that upon its reference to the Cherokee people it would be instantly rejected by nine-tenths of them, and, I believe, by nineteen-twentieths of them. There were not present at the conclusion of the treaty more than one hundred Cherokee

voters, and not more than three hundred including women and children, although the weather was everything that could be desired. The Indians had long been notified of the meeting, and blankets were promised to all who would come and vote for the treaty. The most cunning and artful means were resorted to to conceal the paucity of numbers present at the treaty," &c.

"The Cherokee people are a peaceable, harmless people, but you may drive them to desperation; and this treaty cannot be carried into effect except by the strong arm of force.

"With very great respect,

"I have the honor to subscribe myself

"Your most obedient servant,

"WM. M. DAVIS.

"Hon. Lewis Cass,

"Secretary of War, Washington City."

Brigadier General R. G. Dunlap, in a speech to his brigade September, 1836, at their disbandment, said:

"I forthwith visited all the posts within the first three States and gave the Cherokees (the whites needed none) all the protection in my power * * * My course has excited the hatred of a few of the lawless rabble in Georgia, who have long played the part of unfeeling petty tyrants, and that to the disgrace of the proud character of gallant soldiers and good citizens. I had determined that I would never dishonor the Tennessee arms in a servile service by aiding to carry into execution at the point of the bayonet a treaty made by a lean minority against the will and authority of the Cherokee people * * * I soon discovered that the Indians had not the most distant thought of war with the United States notwithstanding the common rights of humanity and justice had been denied them." (History Cherokee Indians, Royce, 286.)

General John E. Wool, U. S. Army, February 18, 1837, wrote Adjutant General Jones at Washington as follows:

"I called them (the Cherokees) together and made a short speech. It is, however, vain to talk to a people almost universally opposed to the treaty and who maintain that they never made such a treaty. So determined are they in their opposition that not one of all those who were present and voted at the council held but a day or two since, however poor or destitute, would receive either rations or clothing from the United States lest they might compromise themselves in regard to the treaty. These same people, as well as those in the mountains of North Carolina, during the summer past preferred living upon the roots and sap of trees rather than receive provisions from the United States, and thousands, as I have been informed, had no other food for weeks."

Four months later General Wool said:

"Had Curry lived he would assuredly have been killed by the Indians. It is a truth that you have not a single agent, high or low, that has the slightest moral control over the Indians. It would be wise if persons appointed to civil stations in the nation could be taken from among those who have had nothing to do with making the late treaty." (Ibid 290.)

The Cherokees made numerous protests as set out in Senate Document 392, 56th Cong., 1st Ses., p. 8, etc.

To-wit, on March 8, 1836, H. R. Doc. 286, 24 Cong. 1st Ses., V. 7.

June 21, 1836, H. R. Doc. 286, 24th Cong., 1st Ses., V. 7.

September 28, 1836, H. R. Doc. 99, 25th Cong., 2d Ses. V. 5, p. 10.

September 30, 1836, H. R. Doc. 99, 25th Cong., 2d Ses., V. 5, p. 7.

December 8, 1836, H. R. Doc. 99, 25th Cong., 2d Ses., V. 5, p. 14.

Feby. 22d, 1837, H. R. Doc. 99, 25 Cong., 2d Ses., V. 5, p. 4.

December 15, 1837, H. R. Doc. 99, 25 Cong., 2d Ses., V. 5, p. 1.

August 8, 1837, H. R. Doc. 99, 25 Cong., 2d Ses., V. 5, p. 15.
March 16, 1837, H. R. Doc. 99, 25 Cong., 2d Ses., V. 5, p. 18.
Feby. 28, 1838, H. R. Doc. 316, 25 Cong., 2d Ses., V. 9.
June 9, 1838, H. R. Doc. 129, 26 Cong., 1st Ses., p. 29
June 11, 1838, H. R. Doc. 129, 26 Cong., 1st Ses., p. 31.
July 12, 1838, H. R. Doc. 129, 26 Cong., 1st Ses., p. 34.
August 1, 1838, H. R. Doc. 129, 26 Cong., 1st Ses., p. 37.

The sum and substance of these petitions is to set forth the fact that the Cherokees under the treaties with the United States owned the country they occupied and lawfully possessed their property. That the Supreme Court had so declared; that the Federal Government was obliged by treaty to protect them in their rights; that Georgia had determined to deprive them of their rights, of their country, and of their personal property, and of their liberty, and that their appeals to the President had been in vain; that the Treaty of 1835 was made in defiance of the laws and customs of the Cherokees by a few unauthorized individuals; that it was not made by the Cherokee people; that it was not consented to by them; that it was a fraud upon the United States and upon the Eastern Cherokees and that they never would consent to it no matter how disastrous the consequences might be. In the Memorial of March 8, 1836, they explained how the Senate had been misled to the prejudice of the Cherokees in awarding only five millions as the value of the Cherokee country which they held at a minimum value of twenty millions, embracing as it did seven million, eight hundred and eighty two thousand, two hundred and forty acres. In this memorial they set out at great length the details of oppression, threats, violence, arrest, and

imprisonment, with a history of how the pretended treaty was made and they conclude as follows:

"The delegation are sure it cannot be the wish of the Senate of the United States to ratify and have enforced upon the unoffending Cherokee people a treaty made without their authority, false upon its face and against the known wishes of the Nation. Such is the instrument submitted to your honorable body for the truth of the statement, should the Senate require further proof, it can be obtained from numerous persons of unimpeachable integrity and veracity. But if it be the fate of the Cherokee people, and the decree has gone forth that they must leave their homes and native land and seek a new residence in the wilds of the Far West, without their consent, let them be expelled and removed by an Act of Congress, that they or their posterity in after times may have some claims upon the magnanimity of the American people.

"The delegation do solemnly declare that they would consider such an act preferable and more humane than the ratification and enforcement of a fraudulent treaty, false upon its face, and made without the consent of one of the professed contracting parties. The past history of the United States furnishes admonition against the ratification of treaties made with unauthorized individuals. Resting upon the sacred rights of the Cherokee Nation so often recognized, and solemnly guaranteed on the faith of treaties, the delegation now appeal to the sympathies, the honor, the good faith and magnanimity of the United States to preserve and protect their Nation from fraud, rapine, plunder, and destruction. * * * We are all children of the same great Parent and bound to be kind to each other without regard to the situation in which we may be placed. If an earthly parent have a child unfortunately weak and poor, how would he feel to see the brothers of that child abusing it for its misfortunes, insulting its feelings, exulting in their own superiority, curling the lip of scorn with significant cant of the head at its earnest supplications for justice? Let every man's own heart

give him the answer. You have before you that unfortunate child in the weak and dependent Cherokees.

"With hands elevated toward the Throne of Grace and Mercy we all supplicate, saying:

" 'Our brothers, is it true you will drive us from the land of our nativity and from the tombs of our fathers and our mothers? We know you possess the power, but by the tie that unites us yonder, we implore you to forbear.' "

These are the people who are charged now by government counsel with having agreed by treaty to pay for the cost of their own removal.

On December 15, 1837, in a Memorial, the Eastern Cherokees said to Congress:

"We complain of sending among us a large armed force, of the attempt made to prevent the expression of opinion among us, of the arrest and imprisonment of our persons, of the expulsion of our people from their homes; for which even the document in question furnishes no ground or cause. All these, however, sink into insignificance when compared with the one overwhelming calamity, present and prospective, of having the instrument of December, 1835, enforced upon us and our people." (Rec., 45.)

In a remarkable petition submitted to Congress bearing the date February 22, 1838, signed by 15,665 of the Cherokee people the whole nation reiterated "we do solemnly and earnestly protest against that spurious instrument." (Rec., 45.)

Forced Removal in 1838.

On April 6, 1838, Major General Alexander McComb, Commander-in-Chief, directed Major General Winfield Scott to prepare to remove the Cherokees by military force as—

"It is apprehended that the mass of the Nation, under some delusion does not intend to remove to the country provided for them under the stipulations of the treaty entered into with them on the 29th of December, 1835." (H. Ex. Doc. 453, V. 2, 25 Cong., 2d Ses.)

On May 10, 1838, Major General Winfield Scott placed the Cherokees in a state of capture and issued to them the following address:

"Cherokees: The President of the United States has sent me with a powerful army to cause you, in obedience to the Treaty of 1835, to join that part of your people who are already established in prosperity on the other side of the Mississippi. * * *.

"I am come to carry out that determination. My troops already occupy many positions in the country that you are to abandon and thousands and thousands are approaching from every quarter to render resistance and escape alike hopeless. All those troops, regular and militia, are your friends. Receive them and confide in them as such. Obey them when they tell you that you can remain no longer in this country. Soldiers are as kind-hearted as brave, and the desire of every one of us is to execute our painful duty in mercy. We are commanded by the President to act towards you in that spirit, and such is also the wish of the whole people of America.

"Chiefs, headmen, and warriors, will you, then, by resistance compel us to resort to arms? God forbid. Or will you by flight seek to hide yourselves in mountains and forests, and thus oblige us to hunt you down? Remember that in pursuit it may be impossible to avoid conflicts. The blood of the white man or the blood of the red man may be spilt and if spilt, however accidentally, it may be impossible for the discreet and humane among you or among us to prevent a general war and carnage. Think of this, my Cherokee brethren. I am an old warrior and have been present at many a scene of slaughter; but spare me, I beseech you, the horror of witnessing the destruction of the Cherokees."

The entire correspondence between General Scott and the Eastern Cherokees is set forth in Sen. Doc. 392, 56 Con., 1 Ses., 33-39.

Executive Construction on Removal Expense 1838.

On May 18, 1838, the Secretary of War in a letter to John Ross, the principal Chief of the Cherokees, and his delegation, refused to negotiate a treaty with them upon which they could stand, but in his letter said (italics ours):

"If it be desired by the Cherokee Nation that their own agents should have charge of their emigration their wishes will be complied with and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect. *With regard to the expense of this operation, which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted and an application for such further sum as may be required for this purpose shall be made to Congress.*"

This letter was submitted by the President to Congress immediately and on the 23rd of May the House of Representatives passed a resolution requiring an estimate for the amount needed for the removal and subsistence of the Cherokees according to the purport of this letter.

Thereupon the estimate of the War Department was submitted to the Congress of the United States in the following communication:

"Department of War, May 25, 1838.

"Sir:

"In compliance with a resolution of the House of Representatives of the 23rd instant, requiring a statement of the amount that will be required for the addi-

tional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

Payment of the expenses of removing the remaining Cherokees estimated at 15,840, at $30 per head.....	$475,200.00
Amount applicable to that purpose.....	39,300.00
Balance to be provided for.....	$435,900.00
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated, viz., $33.33 a head	611,105.55
Add for contingencies, under estimate both of the number to be removed and of expenses to be incurred.....	100,000.00
The amount of annuities, payment of which is asked for by the deputation, will be	33,330.00
	$1,180,335.55

Very respectfully
Your obedient servant,
J. R. POINSETT.

To Hon. J. L. Polk,
Speaker House of Representatives."

Legislative Construction of Removal Expense 1838.

On June 12, 1838, the Congress of the United States made the appropriation estimated for in the following language: (Italics our own.)

"Sec. 2. And be it further enacted, that the further sum of one million forty seven thousand and sixty-seven dollars be appropriated out of any money in the treas-

ury not otherwise appropriated, in full, for all objects specified in the third article of the supplementary articles of the treaty of 1835 (*removal expense*) between the United States and the Cherokee Indians and for the *further object of aiding in* the subsistence of said Indians for one year after their removal West; *provided, that no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty.*" (5 Stats. 242.)

Assuredly if this language meant anything it meant that the authorities of the United States, both the President and the Congress, believed that the cost of removal and subsistence was to be borne by the United States out of its own treasury. There is not the slightest doubt that the Indians understood this and that they had no idea that they would ever be asked to pay for the cost of removal out of the small sum allowed them for their eastern country.

When Secretary J. R. Poinsett made the proposition to John Ross that the United States would defray the expenses of the removal of the Eastern Cherokees he wrote General Scott immediately as follows:

War Department, May 23, 1838.

"Sir:

You will receive herewith a copy of proposals (already communicated to Congress by the President) made by the Department to the Cherokee delegation now in this city, which it is believed will be accepted by them. You are therefore hereby authorized to enter into an agreement with the agent of the Nation for the removal of their people. The expenses attending the emigration of the Cherokees are now fully ascertained by past experience; and it is presumed you will find no difficulty in making such arrangement as, while it will secure their comfortable removal in the manner most agreeable to their chiefs and head men, will effectually protect the interests of the United States and prevent

all unnecessary delay or useless expenditures." (Sen. Doc. 392, 56 Cong., 1st Ses., p. 11.) (Rec. 89.)

In the account rendered by the United States (Slade-Bender) it was found that the removal of those who emigrated voluntarily under the government officers prior to this date, had cost $61.70 per capita and there was no reason to believe that it could be done more economically. (H. R. Ex. Doc. 182, 53rd Cong., 3rd Ses., p, 10.) Ex. 1 p. 13.

The fact is it cost the Cherokees much more than this to-wit: $103.25. General Scott explained why it cost so much more in his testimony (H. R. Rep. 288, 27 Cong. 3d Ses., p. 37) as follows:

"The drouth that nearly desolated so many States in 1838 commenced in the Southwest at the end of May and continued into October. During the latter eight or ten weeks of its continuance it would have been impossible for a detachment of 100 Indians, with their horses, to have found water on the land routes for many and many marches together; hence all the subsequent difficulties and embarrassments in my plans and the emigration itself; for, but for the drouth, I would have quashed the contract with Lewis Ross as extravagant, and the renewed movement beginning with September would have escaped ice, snow, and bad roads, and been ended in 80 days by each detachment. The drouth was a calamity to the country generally, and particularly so to the poor Cherokees."

On July 21, 1838, the Cherokee Council in General Scott's camp at Aquohee resolved to undertake the emigration of themselves and state in that resolution in the preamble as follows: (Italics ours.)

"And whereas our delegation has just returned from Washington city, and having important suggestions to make to the Commanding General, *under a special understanding with the Honorable Secretary of War, in*

reference to the removal of the Nation to the West, have submitted the matter to this council for advice."

Accordingly on July 26, 1838, the Cherokee Council authorized John Ross and his associates as follows: (Italics ours.)

"They are hereby authorized and fully empowered to make and enter into any and all such arrangements with Major General Scott on the part of the United States which they may deem necessary and proper for effecting the entire removal of the Cherokee people from the East to the West of the Mississippi River, and also to enter into such further arrangements with the Commanding General *in relation to the payment of such sums of money by the United States* as may be necessary for the removal and subsistence of all the Cherokee people."

This limited resolution is the only authority the Cherokees gave to John Ross to receive money from the United States on account of removal, and that authority was given only for the payment of money by the United States on account of such removal and under the special understanding with the Secretary of War that the expense of removal should be defrayed by the United States.

Assuredly the Eastern Cherokees not only believed that the United States was fully bound to pay the entire cost of removal but they had a right to so understand it since the officers of the government, the President, the Secretary of War, and the Senate and the House of Representatives equally well so understood it.

The United States through its local agents in the Cherokee Nation continued to advise the Cherokees that the United States would pay the cost of their removal and subsistence, and would pay them a per capita of $150 besides. This appears in the instructions

sent by the Acting Secretary of War C. A. Harris to Lieutenant J. Van Horne, U. S. A., Sept. 12, 1837, who was directed to enroll the Cherokees where they could be induced to agree to remove in the following instruction:

"Enrolling books must be prepared on the following plan: A memorandum or entry must be inserted, purporting that the subscribers assent to a treaty with the United States upon the terms heretofore offered by the President to their people. And that if no treaty should be made during the next fall, or early in the winter, then the subscribers will cede to the United States all their right and interest in Cherokee lands east of the Mississippi upon the following conditions: That they shall receive, so fast as Congress shall make the necessary appropriation, the ascertained value of their improvements, on their arrival West; that they shall be removed and subsisted for one year at the expense of the United States," etc., etc. (H. R. Ex. Doc. 182, 53rd Cong. 3 Ses. 16.)

It will be remembered that the President in his letter read to the Cherokees October 23, 1835, at the Council of Red Clay had promised them that the United States would pay the cost of removal and subsistence and a per capita of $150 to each Cherokee who removed West. (Rec., 85.)

In the present suit the Court of Claims finds as a matter of fact the Eastern Cherokees were paid only $56.31 per capita excluding interest, and if they should be paid the sum they now claim would only receive $124.78 per capita excluding interest. (Rec., 109.)

In the account rendered by the United States under the Cherokee agreement ratified March 3, 1893, the following statement appears (italics ours):

"It seems to have been the opinion of the War Department as late as November 18, 1836, that the above

article (Art. 8, Treaty 1828) obliging the United States to pay the cost of the removal and subsistence of Eastern Cherokees (moving West), was not superseded or annulled by the Treaty of 1835. On that date Mr. Commissioner Harris wrote Major B. F. Currey, Indian Agent, in the Cherokee country as follows:

" 'Sir:

" 'I acknowledge the receipt of your letter of the 26th of October last, and in reply have to observe that I have taken the decision of the Secretary of War ad interim upon the claim of the Cherokees to commutation for subsistence, at $33.33 each. The Secretary decides that the commutation may be paid at the rate above stated; but at the same time declares that the allowances are made *under the Treaty of* 1828 and not in pursuance of any stipulation of the final Treaty of 1835.'

" 'The *same opinion* has been held in various reports to the Senate and House of Representatives from the Committees on Indian Affairs. Without quoting from them at length the following extract, from report dated February 19, 1847, by Mr. Jarnigan, gives substantially the view which has been expressed in various forms in the reports referred to:

" 'The sole consideration stated for the five millions was their lands and possessions East of the Mississippi River. If anything else had been intended to be included, such as claims for spoliation, subsistence, removal, etc., why was it not so stated in the Treaty? It is enough to show that it is not so stated; but it is manifest that such was not the intention of the parties; for the amount of these spoliations, the expense of removal, etc., were not then known, and could not have been ascertained; and besides, these were subsisting claims upon the government of the United States which they were bound by the treaty to have paid, not to pay them, or to pay them out of the funds of the Cherokees which had been fixed by the Senate as the value of their lands, *was precisely the same thing.*

" 'The United States were bound by the Treaty of 1828 to pay the expenses of the removal of all the Cher-

okees. This obligation was not released by the purchase of their lands at their appraised value. Would such a thing be pretended in a similar transaction between individuals? If all the Cherokees had removed before they ceded their lands, the United States were bound to pay the cost of removal. If the United States afterward bought the lands of the Cherokees, they were bound to pay the price at which they were appraised." (H. R. Ex. Doc. No. 182, 53d Cong., 3d Ses., p. 12.) 4.1.16,

The War Department having determined to remove the Cherokees in May of 1838, sent Captain John Page as disbursing officer and placed in his hands a large fund taken out of the five million dollar fund and thereupon there was disbursed from the five million dollar fund on account of removal expenses the sum of $1,111,284.70, which has never been reimbursed the five million dollar fund.

Captain John Page made the following payments to John Ross on account of these removal expenses out of the five million dollar fund, although Ross appears to have had no means of knowing the source from which the fund was drawn. He had a right to believe it was taken from the fund appropriated by Congress for removal expenses June 12, 1838, to wit:

August 4, 1838	$130,000.00
September 17, 1838	134,960.00
October 16, 1838	264,960.00
November 13, 1838	264,479.04
	$776,399.04

Report from Second Auditor's Office, August 16, 1842 (H. R. Rep. 108, p. 68).

The Constitution and Statutes Violated in Taking the Trust Fund for Removal Expenses.

The Constitution of the United States provides that: "No money shall be drawn from the Treasury but in

consequence of appropriation made by law. (Article 1, Sec. 9, Clause 7.)

And that all appropriations acts must originate in the House of Representatives.

The Act of Congress of March 3, 1809 (2 Stats., 535), provides:

"That all warrants drawn by the Secretary of the Treasury of the United States shall specify the particular appropriation or appropriations to which the same shall be charged. The money paid by virtue of such warrants shall in conformity there with be charged to such appropriation or appropriations in the books kept in the office of the Comptroller of the Treasury, in case of warrants drawn by the Secretary of the Treasury, and in the books of the accountants of the War and Navy Departments respectively, in case of warrants drawn by the Secretary of War or the Secretary of the Navy; and the officers, agents or other persons who may be receivers of public moneys shall render distinct accounts for the application of such moneys according to the appropriation or appropriations under which the same shall have been drawn."

The only appropriation act relating to the five millions of dollars was the act of July 2, 1836, as follows: (5 Stats., 73.):

"For the amount stipulated to be paid for the lands ceded in the first article of the treaty with the Cherokees on the 29th of December, one thousand eight hundred and thirty-five, deducting the cost of the land to be provided for them west of the Mississippi under the second article of said treaty, four million five hundred thousand dollars."

This appropriation act placed this fund in the Treasury of the United States in trust for the Cherokees. It could not be drawn out except in pursuance of an appropriation act to originate in the House of Representatives. The United States is still trustee for the bal-

ance of this fund due per capita to the Eastern Cherokees.

It was drawn out in violation of the law and never has been refunded.

It was not only drawn from the Treasury in violation of law, but was expended in the payment of an obligation of the United States and was an improper charge against the Cherokees.

It was not only withdrawn from the Treasury without authority of law and for an improper purpose, but was expended in disregard of the Act of Congress of June 12, 1838, which provided that the fund appropriated for removal should not be taken from the five million fund.

Congress appropriated July 2, 1836, $600,000, primarily to pay the expense of removal, and added thereto June 12, 1838, the further sum of $1,047,067 for the same primary purpose. The Attorney General of the United States December 16, 1837 (3 Opinions, 297), and February 3, 1838 (3 Op., 304), held that:

"The expense of removal is undoubtedly the first charge on the $600,000."

This opinion, of course, applies with equal force to the enlargement of the $600,000 for the same identical purpose. These two opinions of the Attorney General of the United States were likewise disregarded by the War Department in invading the $5,000,000 fund.

Appropriation for Removal Untouched, But $5,000,000 Fund Invaded in 1838.

The War Department being abundantly supplied with money which they had previously taken out of the five million fund, had no need to utilize the fund appropriated by Congress June 12, 1838, for removal pur-

poses, and that fund was allowed to remain in the Treasury of the United States untouched up to January 1, 1839, when the removal was practically completed, as appears from the report of the Register of the Treasury, on Receipts and Expenditures of 1839, page 260. (Rec. 90, para. 2.) The Court of Claims finds this latter incident as a fact and further finds that out of $1,047,067 appropriated June 12, 1838, only $49,095.31 was actually used by the War Department from the sum so appropriated for removal, while in fact the sum of $1,111,284.70 was taken from the five million dollar fund and used for the expense of removal [precisely as Congress instructed should not be done.] Rec., p. 90.)

It is obvious that these Indians on their heart-breaking journey to the wilderness of the hostile West had neither the means nor the ability of knowing what was transpiring within the accounting department of the government.

The Cherokees having made no preparation to remove were thrown into tremendous excitement by the capture through the military forces of the United States. Large numbers of men were away from their homes interviewing their neighbors and discussing the vital question of what they should do. They were arrested wherever found and thrown into various camps of concentration. Their estates large and small were immediately captured and sold to any sordid adventurer, realizing practically nothing for the owners. In the "sudden and forced gathering of the people into separate masses by the troops children were abruptly severed from doting parents who never met them more." "The young husband was doomed to know that his wife whom he was not permitted to protect, nor

even to behold, had to pause before the rough soldier on the road to a military camp, and under these maddening circumstances, hear the first cry of her infant." "Vast multitudes of both sexes, of all ages, until then habituated to domestic comfort were sickened by the wretchedness and unwholesomeness of being congregated into open fields and crowded under tents during the most scorching heat of summer," and thousands of those nearest and dearest to the surviving Cherokees sunk into miserable graves. The rolls of John Ross showed the death of 600 people in this journey from the East to the West and thousands died of exposure after reaching the Western country.

When the Eastern Cherokees reached the Western Cherokee country John Ross made a resolute effort to establish a united government of the Eastern and Western Cherokees. He called a convention in 1839 and went through a form of declaring an act of Union between the Eastern and Western Cherokees and the adoption of a constitution, but the leaders of the Western Cherokees, knowing that they were in a hopeless minority, refused to co-operate, although a few individuals who were Western Cherokees recognized the wisdom and the imperative necessity of the plan proposed by John Ross and co-operated with him. The effort, however, at a peaceful settlement, substantially failed. There was much bloodshed throughout the Cherokee country. The leaders of the treaty party being killed and outlawed and numerous bitter feuds being actively carried on because of the differences between the Eastern Cherokees, the so-called treaty party, and the Western Cherokees.

Cherokee Commissioners of 1845.

The United States in 1845 sent a Board of Commissioners to the Cherokee country to inquire into their complaints and difficulties, to wit: Hon. Roger Jones, Adjutant General U. S. Army; Hon. Richard B. Mason, Lieut.-Col. 1st Dragoons; Hon. Pierce M. Butler, U. S. Agent. They made their report January 17, 1845. (Sen. Doc. 140, 28th Cong., 2d Ses.) They reported in effect that the five million dollars should not have been charged with expenses of removal and that the United States was bound to restore it and pay it to the Cherokees per capita. They recommended that a new treaty be concluded on the just and liberal basis promised by President Tyler in his letter of September 20, 1841.

President Tyler's letter referred to is as follows:

"I still propose at a future day to negotiate with you a new treaty, which the importance of your speedy return to your homes, to meet the General Council of your nation, will not allow at this time to be done, but you may assure your people that, so far as I shall have any power or influence to effect such results, not justice merely shall be done them, but that a liberal and a generous course of policy shall be adopted towards them. Upon the ratification of the treaty contemplated, which shall give to the Cherokee Nation full indemnity for all wrongs which they may have suffered," etc. (H. R. Rep. 288, 27 Cong., 3d Ses., p. 49.)

The Treaty of 1846 was arranged to restore peace and harmony among the Eastern and Western Cherokees, to provide for the settlement of the claims of the Eastern and Western Cherokees against the United States, and "to make the Eastern and Western Cherokees parties to the Treaty of New Echota, which they had never conceded themselves to be." (Rec. 93, para. 3.)

The Per Capita of 1835-36 a Vested Right.

In interpreting the Treaty of 1846 it should be clearly kept in mind that the payment to the Eastern Cherokees for their communal interest in the lands east of the Mississippi River in the per capita promised them, was a vested personal right. Several thousand of the Eastern Cherokees never did remove from the East and still remain there and obviously the right vested in them could not be taken from them by any subsequent treaty to which they were not parties. The right vested in them can be affected neither by the Treaty of 1846 nor the Cherokee agreement of December 19, 1891.

No such construction could possibly be placed upon the Treaty of 1846 especially. The treaty itself in Article 10 affirms this vested right of the Eastern Cherokees who remained east of the Mississippi River in the following language:

"Article 10: It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in the States east of the Mississippi River had or may have under the Treaty of 1835 and the supplement thereto." (Rec., 96.)

To say that the sums appropriated by Congress for removal should not be charged with removal, but used for other purposes, while the trust fund should be charged with removal, would certainly be a construction of the Treaty of 1846 that would take away the rights and claims of the Indians to the per capita vested in them by the Treaty of 1835. Such a construction is by this article forbidden.

The Treaty of 1846.

Article 1 of the Treaty of 1846 pledged the lands occupied by the Cherokees West of the Mississippi "to the whole Cherokee people for their common use and benefit" and promised them a patent therefor which never has been issued.

Article 2 declared all difficulties and differences theretofore existing between the several parties of the Cherokee Nation thereby settled and adjusted and forever buried in oblivion. That "all party distinctions shall cease, except so far as they may be necessary to carry out this convention or treaty." (Rec., 93.)

It was necessary that the party distinctions of the Eastern and Western Cherokees should not cease until the government had paid them the per capita due by the terms of this treaty. They were communal owners of the lands east of the Mississippi. The Western Cherokees had, however, claimed, after the Ross emigration, that they were exclusive owners of the lands West of the Mississippi under the treaties of 1828 and 1833; that the Eastern Cherokees had acquired no rights therein by the pretended treaty of 1835-6.

The United States insisted that the land granted by the Treaty of 1828 was intended for the whole Cherokee people and not exclusively for the Western Cherokees, that by Article 8 of the Treaty of 1828 that principle was set forth and was well understood. That by that Article the Eastern Cherokees were expressly invited to come to the Western country and make their homes. The Western Cherokees by the Treaty of 1828 gave up to the United States only 2,000,000 acres, while the government granted them for the use of the Cher-

okees East and West 13,500,000 acres in pursuance of the policy determined on by the government to induce the removal of the Eastern Cherokees to the West as rapidly as possible. (Rec. 110.)

The United States was in the difficult position of being obliged to maintain the Treaty of 1835-6, or by conceding that it had no force openly confess to the Cherokees and to the whole world that it was a fraudulent instrument. It was important to the United States therefore to secure the acquiescence of the Eastern and Western Cherokees to this instrument.

The Treaty of 1835 had promised to the Eastern Cherokees the sum of $5,000,000 for their lands and possessions agreeing that after paying individuals for their improvements and ferries and investing $500,000 in land west and the same amount as a general fund, school fund, and orphan fund, for the Nation, the balance should be paid the Eastern Cherokees per capita.

This treaty made no provision for the interest of the Western Cherokees in the lands east of the Mississippi River, but subsequently by the principles agreed on in the 4th Article of the Treaty of 1846, the communal interest of the Western Cherokees was properly provided for.

Western Cherokees Fully Paid for Their Communal Interest in the Lands East as Provided by Article 4, 1846.

The Western Cherokees agreed to leave their claims to a Board of Commissioners. The Commissioners found, as set out in Article 4, Treaty of 1846, that the Western Cherokees had "no exclusive title to the territory ceded in that treaty (1828) but that the same was intended for the use of, and to be the home for the whole

Nation, including as well that portion then East as that portion then West of the Mississippi. The Commissioners further decided that the Western Cherokees were entitled to compensation for their interest in the lands east of the Mississippi "which interest should have been provided for in the Treaty of 1835 but which was not, except in so far as they, as a constituent portion of the Nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi; and in the general funds of the Nation." That therefore, the Western Cherokees had "an equitable claim upon the United States for the value of that interest, whatever it may be."

Article 4, therefore, proceeds as follows:

"Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, to-wit, viz: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousand dollars (which investments and expenditures are particularly enumerated in the fifteenth article of the Treaty of 1835), to be first deducted from the said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts be left for *per capita* distribution among the Cherokees emigrating under the Treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the old settlers (or Western Cherokees) *a sum equal to* one-third part of said residuum, to be distributed *per capita* to each individual of said party of 'old settlers,' or 'Western Cherokees.' It is further agreed that, so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five million six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the eighth article of the Treaty

of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted." (9 Stat. L. 871.) (Rec. 94.)

It was supposed that the Western Cherokees at this time were one-third as many people as the Eastern Cherokees, and therefore the principle was agreed on that they should have, not one-third of the residuum but a sum *equal to* one-third of the residuum to be found in the manner proposed.

There is a great difference between a sum equal to one-third of a fund and one-third of the fund itself. The difference is as vital to the owner of the fund as the loss of one-third of his right, while it makes no difference to the recipient what may be the source from which he obtains his one-third. A piece of apple equal to one-third of my apple is a very different proposition from one-third of my apple.

The principle upon which the Western Cherokees were to be paid was set out in an agreed mathematical proposition intended to compensate them for their equitable claim upon the United States for the value of their interest in the lands East without depriving the Eastern Cherokees of anything whatever. The plan of settlement with the Eastern Cherokees was agreed on in a different Article, to-wit, Article 9 of the same Treaty.

The payment of the Western Cherokees has been concluded. A partial payment was made them in 1851 and the remainder was paid them in 1894. The Supreme Court of the United States settled the entire controversy and closed the account with the Western Cherokees in the following statement:

"The treaty fund.....		$5,600,000.00
Less:		
For 800,000 acres of land...	$500,000.00	
For general fund	500,000.00	
For improvements 1,540,572.27		
For ferries	159,572.12	
For spoliations	264,894.09	
For debts., etc.	60,000.00	
For removal of 16,957 Cherokees, $20 each	339,140.00	3,364,178.48
Giving as the residuum to be divided...		$2,235,821.52
One-third due the Western Cherokees.....		$745,273.84
Less payment September 22, 1851.....		532,896.90
Leaving a balance of.....		$212,376.94

(Rec. 102.)

In this settlement the expense for removal did not exhaust the $600,000 appropriated for that purpose and no part of such expense of removal was deducted from the $5,000,000 fund.

This amount with interest was appropriated to the Western Cherokees August 23, 1894. The Western Cherokees by the rolls of 1852 which control in the final distribution numbered 3,146 persons who received the sum of $236.89 per capita excluding interest. (Rec., 102.)

The Eastern Cherokees, however, numbered 16,231 and received in 1852 only $914,026.13, a per capita of $56.31 and if they now received the fund they claim $1,111,284.70, would only receive a total per capita of $124.78 excluding interest.

It is obvious the Western Cherokees have received more for their communal interest in the lands East than the Eastern Cherokees can now receive. This is explained partly by the fact that the Western Cher-

okees were supposed to be equal to one-third of the number of the Eastern Cherokees, when in point of fact, they were less than one-fifth.

The Supreme Court found the residuum, whereof a sum equal to one-third, was to be divided per capita to the Western Cherokees as $2,235,821.52 (Rec., 102); while the account rendered by the United States May 21, 1894, found the balance to be distributed per capita to the Eastern Cherokees under Article 9 to be $2,025,310.83, over $200,000 less than the residuum found by the Supreme Court under the statement of the 4th Article. (Rec., 109.) Of this sum $914,026.13 was paid them in 1852 and the pending suit is to recover the remainder of such balance, due the Eastern Cherokees per capita, to wit, $1,111,284.70, which, when paid, will give the Eastern Cherokees as stated $124.78 per capita excluding interest. The Western Cherokees have already for their communal interest received $236.89 per capita.

The Eastern and Western Cherokees under the principles of the treaty of 1846 were communal owners of the lands East. But the manner in which the Western Cherokees as such were to be paid was precisely and definitely fixed in Article 4 of that treaty and they have received every dollar due them under the 4th article of that treaty and in pursuance of a decision of this honorable court. (148 U. S. 427.)

The Eastern Cherokees for their communal interest in the lands East were to be paid in the manner stipulated by the 9th Article. They received a partial payment of $914,026.13 in 1852 and the balance $1,111,284.70 is now due them with interest.

The 9th Article of the Treaty of 1846 Provides Payment for Communal Interest of Eastern Cherokees in Lands East.

The manner in which the Eastern Cherokees were to be paid as communal owners of the lands east of the Mississippi River is set forth in Article 9, of that treaty, as follows, to-wit:

"Art. 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the *per capita* division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said Nation; and the several sums provided in the several articles of the treaty, to be invested as the general funds of the Nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the Treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, *per capita*, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the Treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplements thereto."

Article 9 must be construed as modified by Articles 3, 10, and 11, of the same treaty. Article 3 is as follows:

"Art. 3. Whereas certain claims have been allowed by the several Boards of Commissioners heretofore appointed under the Treaty of 1835 for rents, under the

name of improvements and spoliations, and for property of which the Indians were dispossessed, provided for under the 16th Article of the Treaty of 1835; and whereas the said claims have been paid out of the five million dollar fund; and whereas said claims were not justly chargeable to that fund, but were to be paid by the United States, the said United States agree to reimburse the said fund the amount thus charged to said fund, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th Article of this treaty; and whereas a further amount has been allowed for reservations under the provisions of the 13th Article of the Treaty of 1835 by said Commissioners, and has been paid out of the said fund, and which said sums were properly chargeable to, and should have been paid by the United States, the United States further agree to reimburse the amounts thus paid for reservations to said fund; and whereas the expenses of making the Treaty of New Echota were also paid out of said fund, when they should have been borne by the United States, the United States agree to reimburse the same and also to reimburse all other sums paid to any agent of the Government and improperly charged to said fund; and the same shall also form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th Article of this treaty." (9 Stat., L. 871.)

Here was an express provision providing for the correction of various errors which had been confessedly made against the five million fund and providing for the reimbursement of such sums as had been improperly charged against that fund under the caption of:

1st. Improvements.

2nd. Spoliations.

3rd. Property of which the Indians were dispossessed, claims which were not justly chargeable to that fund.

4th. Reservations not properly chargeable to that fund.

5th. The expenses of making the treaty of New Echota.

6th. All other sums paid to any "agent of the Government" and improperly charged to said fund. It was agreed that the same should be reimbursed to the five million fund, and be a part of the aggregate amount to be distributed to the Eastern Cherokees as provided in the 9th Article of this treaty.

The money now sued for was paid to Captain John Page, an "agent of the Government" in 1838, and expended by him on account of removal expenses, and was "improperly charged to said fund" and under the 3rd Article of this treaty should be reimbursed.

Article 11 provides that the question of whether any part of subsistence was charged to the five million fund and whether interest was allowed, should be submitted to the United States Senate as follows:

"Art. 11. Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the West, of the Eastern Cherokees, is not properly chargeable to the treaty fund: it is hereby agreed that that question shall be submitted to the Senate for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say, whether the subsistence shall be charged at a greater rate than $33.33 per head; and also the question, whether the Cherokee Nation shall be allowed interest on what ever sum may be found to be due the Nation, and from what date and at what rate per annum." (Ibid.)

It is to be observed that the question of removal was omitted by the Cherokee delegations in this request for the obvious reason that the Senate had already decided the question of removal in the Treaty of 1836 sustaining

the Cherokees who made the treaty in the proposition that it was not intended that the cost of removal should be charged to the five million fund, and this construction had been confirmed and ratified by Congress July 2, 1836 and June 12, 1838.

It is to be observed that the word "delegations" in the above article is plural showing unanimity in this contention by both the Eastern and Western Cherokees.

The Senate of the United States, Sept. 5, 1850, acting as umpire decided that subsistence was not properly chargeable to the treaty fund and that interest should be allowed upon sums found due the Cherokees at five per cent from June 12, 1838. (Rec. 96 last para.)

Congress on the 30th of September, 1850, ratified and confirmed this award of the Senate declaring on the face of the Statute that certain sums which had been charged to the treaty fund for subsistence had been "improperly charged." (Rec. 97.)

The Eastern Cherokees who remained East of the Mississippi River undertook to preserve their rights against the possibility of any misconstruction of the Treaty of 1846 by the accountants of the United States in Article 10, as follows:

"Art. 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so constructed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi River had, or may have, under the Treaty of 1835 and the supplement thereto." (Ibid.)

Article 10 puts a limitation upon the construction of the Treaty of 1846 so that the accountants of the United States are expressly forbidden to construe the Treaty of 1846 so as "in any manner to take away or abridge" the rights of those Cherokees residing east under the Treaty

of 1835 and the supplement thereto. This inhibition protects all Eastern Cherokees as it establishes a rule of construction.

This article appears to be excess of caution by the Eastern Cherokees but it was not, in view of their experience, and in view of the fact that in this very suit Government counsel has attempted to construe the Treaty of 1846 to deprive the Eastern Cherokees both East and West, of the fund due them. And this contention has been made in the face of the directly contrary opinion of Hon. John J. Crittenden, Attorney General of the United States of April 16, 1851, who passed upon the meaning of the treaty of 1846 at a time when the entire history thereof was fresh in the minds of the officers of the United States. Attorney General Crittenden said:

"The Treaty of 1846 does not expressly nor by implication abrogate any of the interests of the Cherokees in the distribution per capita provided for in the Articles 12 and 15 of the Treaty of 1835. The Treaty of 1846 intends to provide for satisfaction of those claims, not to forfeit, repeal, or annul any of them." (5 Ops. 320.)

The Cherokees so understood the Treaty of 1846. They had not the faintest idea that the treaty could be construed to deny the payment of the very claims for the payment of which the treaty was drawn. If the Attorney General of the United States at the time declares that the Treaty of 1846 intends to provide for the satisfaction of those claims not to forfeit, repeal or annul any of them, who shall believe that the Cherokees otherwise understood the treaty. And as the Indians understood it so is the rule of construction under the decisions of this Honorable Court.

The question in this case is: did the Eastern Chero-

kees understand that by this treaty and the settlement proposed in Article 9 that the five million fund was chargeable with the cost of removal expenses?

If they did not understand by this treaty that removal expenses were to be charged to them they are entitled to recover the amount claimed independently of the Cherokee Agreement of Dec. 19, 1891 and the accounting rendered in pursuance thereof.

Certainly no where in the Treaty of 1846 do the Eastern Cherokees agree that the cost of removal should be charged to the five million fund. Article 9 pledges them a *fair and just* settlement of all moneys due to the Cherokees and subject to the per capita division under the Treaty of 1835. Which said settlement shall exhibit all money properly expended under said treaty. It would not be "fair and just" in making settlement under the Treaty of 1835 to charge the Cherokees with the cost of removal. The settlement proposed by necessary implication excludes all money not "properly" expended under said Treaty of 1835. It would not be necessary in ordinary contracts to stipulate that in a settlement the United States should only take credit for moneys properly expended. Without any stipulation, in a "*fair and just*" *settlement* the United States could not claim credit for sums improperly expended out of a trust fund. Article 9 not only restricts the settlement to exhibit all money properly expended *theretofore* but *thereafter*.

The Understanding of the Cherokees in 1846, When They Agreed to Article 9.

The Supreme Court in the case of the Cherokee Nation *v.* Journeycake, laid down a principle of interpretation we now invoke:

"In order to determine the meaning of this contract we must place ourselves in the circumstances of the parties at the time, with their surroundings and expectations. (155 U. S., 216.)

In order to appreciate the understanding of the Eastern Cherokees in agreeing to a fair and just settlement under the Treaty of 1835, it should be kept in mind that they had before them the history of this entire transaction.

They well remembered Article 8 of the Treaty of 1828 in which the United States had expressly agreed to pay the entire cost of removal and subsistence, and which was in full force in 1846.

They well remembered that with this treaty obligation in full force as a subsisting contract of the United States, that the Senate of the United States had on March 5, 1835, by an award, advised that the Cherokees should receive five millions of dollars for their "lands and possessions" and for their lands and possessions alone, not including other things.

They remembered the letter of President Jackson read to them October 23, 1835, in which they were told that the United States would pay the expense of removal and subsistence and pay them a per capita of $150 each.

They remembered the Cuthbert letter of Feb. 29, 1835.

They remembered that the Treaty of December 29, 1835, with its supplementary articles, had construed this very question. That the Senate in supplementary Article 2 had decided that it did not intend the five millions to include removal or spoliations.

They remembered that the Congress of the United States on the 2d of July, 1836, had sanctioned and ratified the decision of the Senate and had appropriated a sum estimated as more than sufficient to pay the entire cost of removal and spoliations.

They remembered too how bitterly they were opposed to leaving their old homes, and they knew that in a "fair and just" settlement they ought not to be charged with the expense of doing that which was of value to the United States but which was heart breaking to them.

They remembered too that the Department of War had advised the Cherokee Indian Agent B. F. Curry, on November 18, 1836, that the 8th Article of the Treaty of 1828, was in full force, and that Curry had so advised them.

They remembered that Lieut. J. Van Horne, the enrolling of the War Department under instructions of September 12, 1837, had been over their country trying to enroll the Cherokees for removal West, and promising them by the terms of the enrollment that the United States would pay the cost of removal and subsistence, and the terms which had been offered by the President, which included $150 per capita.

They remembered that the Secretary of War had on the 18th of May, 1838, agreed with John Ross and his delegation that the United States should defray the expense of the removal of the Cherokees.

They remembered that this proposal of the Secretary of War had been by the President submitted to the Congress of the United States and that Congress on June 12, 1838, had sanctioned and confirmed the action of the Secretary of War, and appropriated a sum estimated as more than sufficient to pay the entire cost of removal.

And they well remembered too the pledge of the President of the United States, John Tyler, in his letter to them of September 20, 1841, in which he agreed that:

"Not justice merely shall be done them, but that a liberal and generous course of policy shall be adopted towards them upon the ratification of the treaty con-

templated, which shall give to the Cherokee Nation full indemnity for all wrongs which they may have suffered."

They remembered too that the President of the United States had appointed three distinguished men to examine into their affairs: Hon. Roger Jones, Adjutant General of the United States Army; Hon. Richard B. Mason, Lieutenant Colonel of the First Dragoons; and Governor Pierce M. Butler, United States Agent. They remembered that these Commissioners in their report to the President (Senate Doc., 140, 28 Cong., 2d Ses. Vol. 8, p. 12) had taken strong grounds in their behalf and recommended that the per capita promised them by the Treaty of 1835 should be immediately made and that a new treaty on the liberal basis proposed by President Tyler should be made.

How could these Indians have understood with this record before them, when they were promised by Article 9 of the Treaty of 1846 a "fair and just" settlement, which should exhibit all sums properly expended, that they were in fact agreeing to charge themselves with the cost of removal and subsistence and were by their own act agreeing to deprive themselves of the per capita promised them as the purchase price of their lands east.

Even if they should recover the amount now in suit they would receive less than 50 cents an acre for the lands they sold to the United States in 1836.

Even if they should now recover they would only receive a per capita of $124.78 instead of $150 as promised them by President Jackson, and they will have waited for settlement seventy years.

There can be no possible doubt that these Eastern Cherokees understood and truly believed that the Treaty

of 1846 was made for the purpose of paying them the amount promised them by the United States in the Treaty of 1835-36, and not drawn for the purpose of annuling such claims in whole or in part.

The Attorney General of the United States himself immediately after this treaty was made, on December 27, 1851, as we have heretofore shown, held that the Treaty of 1846 was not intended to "forfeit, repeal, or annul any of them," but that "the Treaty of 1846 intends to provide for the satisfaction of these claims." (5 Opinions, 520.)

If the Attorney General of the United States so understood it, Government counsel should not now be heard to charge these Indians with a contrary understanding of the Treaty of 1846.

By Article 11 of the Treaty of 1846 it was agreed to submit to the Senate of the United States the question whether the five million fund was chargeable with the cost of subsistence. The Cherokees insisted that it was not chargeable with "subsistence" for the reasons which have been substantially set forth above relative to removal, removal and subsistence being substantially one transaction and occurring throughout the treaties always together and qualified by the same language in the various articles, as in Article 8 of the Treaty of 1828, Article 15 of the Treaty of 1835, Article 9 of the Treaty of 1846 and Article 4 of the Treaty of 1846. On September 5, 1850, the Senate as umpire adopted the following resolution:

"Resolved by the Senate of the United States that the Cherokee Nation of Indians are entitled to the sum of $189,422.76, for subsistence, being the difference between the amount allowed by the Act of June 12, 1838 and the amount actually paid and expended by the United States, and which excess was improperly

charged to the treaty fund in the report of the accounting officers of the Treasury."

Here the Senate of the United States, acting as umpire and in pursuance of a treaty, declared expressly that certain money paid for subsistence was "improperly charged" to the Treaty fund. If this is true and if the word "subsistence" is qualified in the treaties precisely as the word "removal" in the same identical articles, it is obvious that removal by like interpretation is also not chargeable to the five million fund.

On September 30, 1850 (9 Stats. 556), the Congress of the United States ratified and confirmed the above decision of the Senate as follows:

"For the additional amount for expenses paid for subsistence and improperly charged to the treaty fund, according to the award of the Senate of 5th day of September, 1850, under provision of the 11th Article of the Treaty of 6th day of August, 1846, $189,422.76, and that interest be paid on the same at the rate of five per cent per annum according to a resolution of the Senate of 5th September, 1850; provided that said money shall be paid by the United States and received by the Indians on condition that the same shall be in full discharge of the amount thus improperly charged to the treaty fund.

Here Congress in this Act twice declares that money charged against the treaty fund for subsistence was "improperly charged."

This is a legislative interpretation that subsistence is not properly chargeable to the five million fund. If it was not proper to charge the treaty fund with the cost of removal it was not proper to charge that fund with the cost of "subsistence," and vice versa, because, both in the 15th Article of the Treaty of 1835 and the 9th Article of the Treaty of 1846, these terms are qualified precisely in the same way.

This interpretation as to subsistence rested on the same basis which led Congress in 1836 and in 1838 to decide that "removal" was not chargeable to the $5,000,000 fund.

The reason why it was improper to charge the five million fund with removal or subsistence was because the five million fund belonged to the Cherokees as the purchase price of their land. That purchase price was not chargeable with the cost of removal or subsistence because removal and subsistence were treaty obligations of the United States. The same reason applies with equal force to the removal and subsistence expenses and rendered it equally improper to charge the five million fund with the expense of either.

The Eastern Cherokee fund of $5,000,000 having been improperly charged on account of removal expense in the sum of $1,111,284.70, that sum should now be reimbursed and paid to the Eastern Cherokees as provided by Article 9 of the Treaty of 1846, with interest as provided by Article 11 of that treaty.

When the United States made up the accounts in 1851 the Cherokees immediately protested against such settlement by resolution of the national council of November 27, 1851, upon nine counts. (Rec. pp. 98-99.)

The first count of the Cherokee protest was as follows:

"Because no allowance is made for the sums taken from the treaty fund for the removal to the West, although that charge depended precisely on the same word in the Treaty of 1835 as did the one year's subsistence, the Senate unanimously decided on the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially

presented. It was again so considered by Mr. Poinsett, Secretary of War, in 1838, and his decision was sanctioned by the action of Congress and an appropriation was made for that purpose. (Rec. 98.)

This language shows how the Cherokees understood the matter at that time.

The nine objections made in this protest to the settlement of 1851 were carefully reviewed by the United States in the accounting rendered in pursuance of the Cherokee agreement of December 19, 1891. Most of the points were decided against the Cherokees, but in the matter of removal expenses the United States found in favor of the Cherokees and that the sum of $1,111,284.70 with interest was due under the 9th Article of the Treaty of 1846, or the 15th Article of the Treaty of 1835, each of which was to the same effect.

Counsel for the Government has heretofore claimed that the decision of the court in the Western Cherokees case (148 U. S. 427) has found that removal expenses were justly chargeable to the five million fund.

The fact is, in the settlement with the Western Cherokees the Supreme Court of the United States in casting up the accounts found that the cost of removal expenses $339,140, was chargeable against the aggregate sum of $5,600,000. It was a primary charge on the $600,000 fund appropriated for that purpose. It did not exhaust the fund appropriated for removal, and did not therefore come out of the five million fund at all.

The Eastern Cherokees were not parties in the case of the Western Cherokees against the United States and would not have been bound even if such interpretation had been made, as to the Western Cherokee settlement under Article 4, in which the Eastern Cherokees were not involved.

The Question of Interest.

The United States in rendering the complete account of moneys due under the treaties, found that, under the 9th Article of the Treaty of 1846, there was due the Cherokees the sum of $1,111,284.70, which had been improperly charged to the $5,000,000 fund on account of removal expenses, and interest thereon from June 12, 1838, to date of payment.

Under the 11th Article of the Treaty of 1846, the Cherokees had agreed to submit to the Senate of the United States, as umpire, the question whether interest should not be allowed them on the sums found due them. The Senate of the United States, as umpire, on September 5, 1850, found that interest should be allowed in the following resolution:

"Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid." (Rec. 96.)

When the Western Cherokees appealed to the Supreme Court of the United States upon this question, demanding interest upon the balance of the per capita due them under this same treaty, and that they should be allowed interest upon the sum which *should have been found due to them in* 1851, the Supreme Court through Mr. Chief Justice Fuller said: (italics ours.)

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed at the rate of five per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum *then found due was less than*

should have been found due by the amount of $212,376.94.

"Under Section 1091 of the Revised Statutes, no interest can 'be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest;' and in Tillson *v.* United States, 100 U. S., 43, it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed; was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. (9 Stat. 556 C. 91.)

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item $4,179.26, which stands upon different ground." (148 U. S., 478).

No argument of counsel can add anything whatever to the force of this declaration by the Supreme Court of the United States.

The Congress of the United States on numerous occasions recognized the force of the decision of the Senate and made appropriations accordingly, appropriating the funds due as interest.

On September 30, 1850, Congress appropriated to the Eastern Cherokees in reimbursing an amount improperly charged the treaty fund for subsistence the sum of $189,422.76, with the provision:

"That interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of the fifth of September, eighteen hundred and fifty." (9 Stat. 556.)

On February 27, 1851, Congress, in appropriating the amount of the per capita then conceded to be due the Eastern Cherokees, to-wit, $724,603.37, provided as follows:

"And interest on the above sum at the rate of five per centum per annum, from the twelfth day of June, eighteen hundred and thirty-eight until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated." (9 Stats. 572.)

Congress, on September 30, 1850, in appropriating the amount of the per capita, then conceded to be due the Western Cherokees, provided:

"That interest be allowed and paid upon the above sums due respectively to the Cherokees and Old Settlers, in pursuance of the above mentioned award of the Senate, under the reference contained in the 11th Article of the Treaty of sixth August, eighteen hundred and forty-six." (9 Stat. L. 556.)

On August 23, 1894, Congress appropriated for the benefit of the Western Cherokees the amount found due them by the Supreme Court including interest up to the date of the judgment of the Court of Claims under the same principle above set forth. (28 Stat. 451.)

On March 3, 1899, the Congress of the United States made the following appropriation to the Western Cherokees:

"That the sum of $29,857.74, being the interest at five per centum per annum from June 6, 1893, to March 28, 1896, due the Western Cherokee Indians under the award of the United States Senate of September 5, 1850, on the principal sum of $212,376.94, found to be due

them under the decision of the Supreme Court of June 6, 1893, is hereby appropriated, to be paid to the authorized agent of the council of the Western Cherokee Indians." (30 Stat. 1235.)

The sum found due the Eastern Cherokees in 1852 *was less than should have been found due them by the amount of* $1,111,284.70, and under the principle laid down by the Supreme Court in the first paragraph of the above quotation from the decision in case of the Western Cherokees, the Eastern Cherokees are entitled to the interest as claimed.

The question of interest was a "subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself" in 1846 and in the "agreement itself" in 1891, and is precisely the same in principle as that of the Western Cherokee case.

To Whom Should the Judgment Be Rendered—To the Cherokee Nation as a Government, to the Cherokee Tribe as a Tribe, or to the Eastern Cherokees as a Band?

The jurisdictional act (Rec., 78, last of para. 3.), of March 3, 1903 (32 Stats. 996), authorizes the court "to render a judgment in favor of the **rightful claimant,** and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part." (Rec. 78.)

The jurisdiction act of March 3, 1903 (Rec. 78), was passed at the request of the Eastern Cherokees who desired expressly to determine the issue between themselves and the Cherokee Nation.

The House of Representatives at the suggestion of the Eastern Cherokees had passed a resolution on December

16, 1902, inviting a report from the Attorney General on the claim of the Eastern Cherokees. The Eastern Cherokees argued the case before the Attorney General but on January 16, 1903, the Cherokee Nation, as a body politic, by its attorneys denied the claim of the Eastern Cherokees. The Attorney General on January 22, 1903, made the following report to Congress:

"The Cherokee Nation, as I am informed, asserts a right to this claim; has employed counsel to prosecute the same agreeably to said statute, and is about to institute a suit upon the claim in the Court of Claims against the United States.

"The terms of the statute are, fortunately, such that the Eastern Cherokees, who, as I am informed, claim adversely to the Cherokee Nation, may be made parties to the suit and compelled to litigate with the Cherokee Nation their adverse assertions of ownership, so that the rightful claimant against the United States may be judicially ascertained after full opportunity upon the part of both claimants to be heard, and the United States be thereby fully protected in the payment of the claim of the successful claimant, if the claim be adjudged to be a valid one against the Government." (H. R. Doc. 309, 57th Con., 2d Ses., p. 3.)

Thereupon, the Congress on March 3, 1903, authorized the court "to render a judgment in favor of the rightful claimant," and provided in the jurisdictional act that "both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned."

If the Eastern Cherokees are the rightful claimants they are entitled under the jurisdictional act to the judgment. If the Cherokee Nation as a body politic is the rightful claimant, or if the Cherokee tribe as a tribe is the rightful claimant, it is entitled, as such, to

the judgment. It is obvious that there can be but one rightful claimant. Either the Eastern Cherokees must have judgment or the Cherokee Nation as a body politic must have it.

These are the only claimants in fact before the court.

The Cherokee Nation has brought its suit as a body politic and not as the Cherokee tribe. There is a vast difference between the Cherokee Nation as a body politic and the Cherokee tribe as an aggregation of people. The attorneys of the Cherokee Nation take great pains to declare the Cherokee Nation, claimant in this case, a body politic, and in their petition (Rec. 1, last paragraph) say:

"Second. The Cherokee Nation, claimant herein, is, and since the act of union between the Eastern and Western Cherokees, on July 12, 1838, has been, a body politic, and recognized and dealt with as such by the United States in all matters affecting the rights, interests and property of the Cherokee Nation or tribe, or the members thereof; and is, as such, the 'Cherokee tribe' mentioned in Section 68 of the Act of Congress aforesaid, and authorized thereby to bring this proceeding."

It thus appears that the Cherokee Nation brings its suit as a body politic and asserts that the term "Cherokee tribe" referred to in the jurisdictional act is a body politic.

The language of Section 68 is that jurisdiction is conferred upon the court to adjudicate "any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States."

Obviously the Cherokee tribe or any band thereof, means the Cherokee people as a people or any band thereof, and does not mean the Cherokee Nation as a

body politic or any band thereof, because a body politic is not capable of being sub-divided into bands. A body politic is a governmental organism comprised of executive, legislative and judicial departments not capable of sub-division into bands.

The Cherokee Nation, as a body politic, was not authorized to bring this suit.

The Cherokee Nation, as a body politic, not being authorized by the jurisdictional act to bring suit cannot possibly recover judgment in this consolidated case.

It is not the "rightful claimant." It is not even authorized to sue as "claimant."

The Cherokee Nation, as a body politic, is not really a possible claimant of the fund in question, because the Cherokee Nation as a body politic has never owned or pretended to own the land of which this fund is the proceeds. The owner of the Cherokee Outlet was the Cherokee tribe and the bands thereof including not only Cherokees by blood, but their adopted citizens, the Delawares, the Shawnees, the Freedmen, whose rights as such have been determined by this Honorable Court.

Since the Cherokee Nation, as a body politic, was not authorized to bring this suit by the jurisdictional act, and since the Cherokee Nation, as a body politic, was not the owner of the Cherokee Outlet or the proceeds thereof, much less of the proceeds of the lands owned by the Eastern Cherokees east of the Mississippi and sold to the United States by the Treaty of 1835, it follows that the Cherokee Nation as a body politic is not the rightful claimant.

Status of Cherokee Nation as a Body Politic.

In making the Cherokee agreement of December 19, 1891, the Cherokee Nation, as a body politic, acted as

the representative of its citizens according as their rights might appear by the provisions of the treaties. In the Delaware case it was held by this Honorable Court (155 U. S., 196), that the Delawares were equally entitled to participate in the cash proceeds of the Outlet as other Cherokees by blood, under the 15th Article of the Treaty of 1866, and the Delaware Cherokee agreement of April 8, 1867. In the Shawnee case (155 U. S., 218), the same decision was rendered, recognizing in the Shawnees their right to an equal per capita payment out of such proceeds of the Outlet in accordance with their rights as established by Article 15 of the Treaty with the Cherokees of July 19, 1866, and the Cherokee Shawnee agreement of June 7, 1869. In the Freedmen case the Court of Claims rendered the same decision in effect, giving them a like right to an equal per capita out of the proceeds of the sale of the Cherokee Outlet in accordance with their rights as established by the 9th Article of the Cherokee Treaty of July 19, 1866 (30 Ct. Cls., 159), and said:

"The United States have repeatedly recognized in their transactions with the Cherokees the dual character of the people, sometimes national and sometimes communal. They have also recognized portions of the people as distinct communities. In 1835 they so dealt with the Georgia Cherokees as communal owners, setting apart a portion of the purchase money of their lands for national purposes, but paying part to them per capita. In 1846 they so dealt with the Western Cherokees, segregating them from the mass of their countrymen and paying them individually, a community within a community. In 1866, and by the very treaty which lies at the foundation of this suit, they recognized the Delawares as communal owners of a fund in the Treasury, for though the Delawares were to be merged in the Cherokee Nation and become Cher-

Memorandum.

In this brief the Cherokee Nation has been referred to as "a body politic" in the sense and to the extent only that it might be regarded as a government. The Eastern Cherokees emphatically deny that the Cherokee Nation is a body politic, and do not concede that it ever has been a body politic or a body corporate recognized as such by the United States, or that it has been recognized in any other capacity than as a "community" acting through its chosen representatives. It has no chartered existence as a body politic. It has only been recognized as a community with limited power of self-government, long since destroyed, and with the power to act through its chosen instrumentalities, the National Council and the Chief, in dealing with the United States. In the Cherokee allotment act of 1902, by which the complete disintegration of the Cherokee Nation as a government was effected, it was done by a vote of the whole people as a community.

okee citizens, and contribute to the Cherokee fund, nevertheless, there was to remain in the Treasury a portion of the Delaware fund which would not pass to the Nation for national purposes, but which would continue to be the separate property of a people who were no longer to be a body politic, a nation, but who, so far as the ownership of the fund was concerned, were still to be communal owners. Still later the United States have recognized the continued existence of these communities by allowing them to bring actions in this court in regard to their communal property."

(Eastern Cherokees *v.* U. S., 20 C. Cls., 449; Western Cherokees *v.* U. S., 27 Id. 1; Shawnes *v.* U. S., Id. 447; Delawares *v.* Cherokee Nation, 28 Id., 281.)

The Cherokee agreement of December 19, 1891, provided that the proceeds of the Cherokee Outlet should be paid to the Cherokee Nation, but nevertheless the courts found that the fund was due to the citizens of the Cherokee Nation, as their rights appeared under the treaties by which they acquired the right to participate in the proceeds of the sale of this property.

The Congress of the United States found that the Cherokee Nation as a body politic was acting unjustly to the constituent communities of the Cherokee Nation and authorized these communities to enforce their rights through the courts. Even before the Cherokee agreement was made Congress had taken this step on October 1, 1890, in authorizing the Delaware, Shawnee, Freedmen suits (26 Stat., 636), because the Cherokee Nation as a body politic theretofore had made an unfair distribution of funds received from the sale of a portion of the outlet and from the grazing privileges upon that tract of land.

At the very time when the Cherokee agreement of December 19, 1891, was ratified (March 3, 1893), Congress

authorized the Commission to the Five Civilized Tribes, known as the Dawes Commission, to open negotiations with the Cherokee Nation and the Five Civilized Tribes for an allotment of the lands of these tribes and a dissolution of their governments. The tribes being unwilling to negotiate, the Congress of the United States on June 7, 1897 (30 Stat., 83), passed the following act, to wit:

"Provided further, That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first eighteen hundred and ninety-eight, by any person in said Territory, and the United States Commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts."

This act thus, in effect, abolished the courts of the Cherokee Nation and its constabulary and the authority of the legislative and executive departments thereof.

At the same time and in the same Act Congress provided also, as follows:

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their pas-

sage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage: Provided, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

It will be observed that this practically emasculated the legislative functions of the Cherokee Nation, if indeed the previous section had not accomplished that result.

On June 28, 1898 (30 Stats. 502) the Congress of the United States directed the United States Commission to the Five Civilized tribes to make up the rolls of the Cherokee people and to allot the lands of that tribe to its citizens making all needful rules and regulations for the accomplishment of that purpose.

By this act it was provided among other things as follows:

"Sec. 26. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

It is clear that since the judicial department of the Cherokee Nation had been abolished by the Act of June 7, 1897, and since Section 26 of the Curtis Act provided that the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States, the legislative and executive departments of the Cherokee Nation was abolished to all intents and purposes since there was no means of enforcing its laws. The Cherokee national council and the Chief could not under these statutes punish the crime of murder.

It was further provided in the Act of June 28, 1898 (30 Stat. 502) in Section 19 as follows:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments, or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

In other words, the Cherokee Nation after the passage of this act was not permitted to receive any further moneys, and especially was it forbidden to receive any moneys due and payable to the members of the tribe per capita.

Its Capacity to Act as Trustee Was Thus Abolished.

The Cherokee Nation as a governmental organism was by these acts itself practically dismantled and destroyed. Its courts had no jurisdiction. Its constabulary had no function. If its legislature passed laws they were a nullity not capable of enforcement. Its executive had no laws to execute.

On July 1, 1902 (32 Stat., 725, Section 63) the Congress of the United States passed a final allotment act, arranging the complete disposition of all property of the tribe and authorizing them by their vote to approve the same, which the Cherokee people did on August 7, 1902. It was provided by this act, Section 63, as follows:

"The tribal government of the Cherokee Nation shall not continue longer than March 4, 1906."

In 1903 the last regular election of the Cherokee peo-

ple for the election of a national council, was held, and the national council which is the tribal legislature expired on the 30th of October, 1905, the present nominal chief having refused to call an election for a successor to the council. There is now no legislative branch of the so called Cherokee government as a body politic, and the chief has no function except that of clerk to sign his name to allotment deeds up to March 3, 1906, when this privilege will cease in default of some special arrangement to be made by Congress.

In view of this condition of the Cherokee Nation as a body politic, it is manifest that Congress intentionally authorized the Cherokee tribe or a band thereof to sue and did not authorize the Cherokee Nation as a body politic to sue. The Cherokee tribe would not become extinct. The Cherokee Nation as a body politic was already defunct, and in the very act of July 1, 1902, authorizing this suit in Section 68, the complete cessation of the Cherokee Nation as a body politic was provided in Section 63 immediately in advance of the Section 68 giving jurisdiction to the courts to hear this case.

The Eastern Cherokees therefore insist:

1st. That the Cherokee Nation as a body politic was not authorized to bring suit and therefore is not and cannot be the rightful claimant.

2nd. That the Cherokee Nation as a body politic is not, and cannot be, either the legal or the equitable owner of the fund, or any part thereof since the Cherokee Nation as a body politic has never owned either lands or moneys, under the decisions in the case of the Delawares, Shawnees and Freedmen, but the lands and moneys of the Cherokees belong to the citizens of the community as communal owners. Therefore the Cherokee Nation as a body

politic is not the rightful claimant and is not entitled to judgment.

3rd. That the Cherokee Nation, as a body politic, has had no capacity to act as Trustee for anybody, since June 28, 1898.

The Eastern Cherokees were the owners of the lands east of the Mississippi River sold to the United States by the Treaty of 1835-36, and the fund in controversy is the balance of the proceeds of the sale of such communal lands and is directly due to the Eastern Cherokees per capita by the 9th Article of the Treaty of 1846, as well as by the principles laid down in the Deleware, Shawnee and Freedman cases. The principle in the cases referred to is that the communal owners of the lands sold are entitled to the proceeds of such sale. (155 U. S., 196 and 218; 30 Ct. Clms., 159.)

Under the account rendered in pursuance of the Cherokee agreement there were four items, three of which belonged to the whole Cherokee people West. The first item (Rec., 108), is the value of three tracts of land which by treaty belonged to the general school fund—$2,125.00. The third item was a part of the proceeds of the sale of lands in Kansas owned by the whole Cherokee people and therefore belonging to the whole Cherokee people—$432.28. The fourth item, which had been taken from the Cherokee National fund, belonged to the whole Cherokee people under the Treaty of 1866.

The second item of $1,111,284.70, with interest, belonged to the Eastern Cherokees as the proceeds of their land as above explained.

The Cherokee Nation as a body politic being defunct, the Court of Claims was compelled in its judgment providing for the disposition of these three items

belonging to the whole Cherokee people, to provide that they should be credited on the books of the United States and held by the United States as trustee. It is true that the judgment as to the sum of $432.28, provides that it may be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it. But the judgment might as well have said that it should be paid directly to the United States as trustee, because there is no proper agent of the Nation to receive it, and it cannot be paid to any proper agent of the Cherokee Nation, since that Nation as a body politic is defunct, and when this case is terminated there will be no Cherokee Nation.

How can the Cherokee Nation as a body politic have judgment rendered to it when it has no capacity to act as trustee and when the Court of Claims recognized its incapacity to receive or administer the tribal funds, and in the very face of the judgment declared that the United States shall act as trustee for the tribe.

Since the court was compelled to declare that the United States must act as trustee for the sums due the whole Cherokee people, is it not clear that the Cherokee Nation as a body politic was not recognized by the court as having either the right or capacity to act as such trustee? It therefore follows that the Cherokee Nation as a body politic is not the "rightful claimant" either for itself or as a trustee.

There are but two claimants before the Court in this case, the Cherokee Nation as a body politic and the Eastern Cherokees. One or the other of these claimants is the rightful claimant if the judgment goes against the United States. That the Eastern Cherokees constitute the rightful claimant and the only rightful claimant we humbly submit has been conclusively shown.

The Eastern Cherokees of North Carolina.

Between the Cherokee Nation as a body politic and the Eastern Cherokees of North Carolina there is no privity whatever on any theory of the case. The Eastern Cherokees of North Carolina are not citizens of the Cherokee Nation as a body politic. The Cherokee Nation as a body politic, even if the above considerations did not otherwise render it impossible, could not claim to be trustee for the Eastern Cherokees of North Carolina, since such Cherokees owe no allegiance to the Cherokee Nation and the Cherokee Nation would owe them no protection even if it had capacity as a government, which it has not. If the Cherokee Nation as a body politic is the rightful claimant and a judgment should be rendered to the Cherokee Nation in such capacity as the rightful claimant on the theory that the body politic was a trustee for its own citizens, that theory could not obtain as to the Eastern Cherokees of North Carolina who have not only not recognized the Cherokee Nation as their trustee, but on the contrary have vigorously protested on various occasions to the United States against the Cherokee Nation as a body politic or otherwise acting in any capacity as the representative of the Eastern Cherokees of North Carolina. The Eastern Cherokees of North Carolina on March 2, 1896, memorialized the Congress of the United States (Sen. Doc. 143, 54th Congress, 1st Ses.), praying that Congress should provide for payment to them of their per capita shares directly and did not recognize the Cherokee Nation as their trustee and in the proceedings of this case the Eastern Cherokees of North Carolina as a band and the Eastern Cherokees of Indian Territory as a band and acting together and as

one body under the authority of the jurisdictional act, have protested, and do protest, against the Cherokee Nation, either as a body politic or as a tribe, acting in any capacity for them as trustee, representative or otherwise.

The United States is and has ever been the Sole Trustee of the per capita due all the Eastern Cherokees by Art. 9, Treaty 1846, and the appropriation Act of July 2, 1836.

The Cherokee Nation, through its National Council, has never claimed this fund as against the Eastern Cherokees, but on the contrary the Cherokee National Council did by Act of December 7, 1900, concede the right of the Eastern Cherokees to this very fund, and declared that if the fund could be collected, it should be paid to the Eastern Cherokees exclusively, in the following language:

"Be it further enacted that all moneys which may be collected belonging to the $5,000,000 treaty fund of 1835, shall be paid out per capita when collected to the persons entitled thereto, as set forth in the Ninth Article of the Treaty of 1846." (Rec. 40, par. 5.)

The Cherokee National Council never thereafter departed from this expression, which is the latest authorized expression of the Cherokee Nation as a body politic.

The Cherokee Nation as Trustee.

In effect the judgment of the Court of Claims was that the judgment should go to the Cherokee Nation, but that the fund belonged to the Eastern and Western Cherokees. Whether the court regarded the Cherokee Nation as a government, a body politic, or as a tribe does not clearly appear from the judgment, but it is obvious that

in some capacity judgment was rendered the Cherokee Nation as a representative of the Eastern and Western Cherokees.

Neither as a tribe nor as a body politic can the Cherokee Nation recover as Trustee of the Eastern Cherokees, because:

First. The Eastern Cherokees have full capacity to sue under the jurisdictional act and are representing themselves in this controversy.

Second. The Cherokee Nation could not receive judgment as Trustee for the Eastern Cherokees, because the United States is the trustee of the Eastern Cherokees under the Appropriation Act of March 2, 1836 and Article Nine of 1846, pledging the fund then appropriated to the Eastern Cherokees per capita. The Eastern Cherokees have not released the United States as their trustee and will not do so.

Third. The Cherokee Nation as our trustee has not brought any suit, but denies the trust.

Fourth. As a body politic it has no standing as suitor in this case.

Moreover, Congress, by the Acts of June 7, 1897, June 28, 1898 and July 1, 1902, has practically abolished the Cherokee Nation and has utterly deprived it of the capacity to act as trustee for anyone. It is no longer a Government; it is an empty name. It has no legislature; it has no judiciary and its chief is merely a clerk to sign allotment deeds. By section 19 of the Act of June 28, 1898, Congress forbade the Cherokee Nation thereafter to receive funds due to the citizens of that Nation but directed that the officers of the United States should perform that duty.

The right or power of the Cherokee Nation to act thereafter as Trustee or to receive judgments as such, was abolished.

How can the Cherokee Nation receive judgment under such a state of facts? and how can it be allowed to receive judgment as our trustee?

The Cherokee Nation as trustee is not entitled to judgment because it has brought no suit as trustee; it is not even a claimant as trustee. It denies that it is a trustee. Its right or power to act as Trustee is abolished. It therefore is not entitled to judgment as trustee.

Shall an extinct and defunct body politic receive judgment against the Eastern Cherokees as our trustee, when it has made no claim; has filed no petition; has denied any trust relation, and has attempted to destroy the claim of the Eastern Cherokees; when Congress has expressly deprived it of the power to act as trustee and when the court has been obliged to recognize the United States as trustee for funds confessedly due the Cherokee tribe in this very case?

The Eastern Cherokees, being in court with full capacity to sue, have established the fact that they are the rightful claimant; that there is no other rightful claimant; that no one can pretend to represent them since they have the legal right to represent themselves. They therefore humbly pray the court to direct a judgment to be entered to the Eastern Cherokees directly for the full amount claimed by them of $1,111,284.70, with interest at 5 per cent. per annum from June 12, 1838, until paid, without any deduction on account of attorneys' fees contracted by the Cherokee Nation assuming to be a body politic, under contract of January 16, 1903, and subject alone to the fees and expenses to be allowed by the Court of Claims in pursuance of the Act of March 3, 1903. (32 Stats., 996.)

The Per Capita Fund of the Eastern Cherokees Cannot be Charged With the Obligation Incurred by the Cherokee Nation as a Body Politic in this Attempt to Defeat the Eastern Cherokees.

The Eastern Cherokees insist that the per capita fund due them by the United States is not chargeable with the expense of attorneys employed by the so-called Cherokee Nation to defeat them of their rights.

The Cherokee Nation, in this case, has attempted to deprive the Eastern Cherokees of the fund in question. If the Cherokee Nation had recovered in the contention made in its behalf the Eastern Cherokees would have been defeated of their rights. As a body politic (if it existed), the Cherokee Nation (if not defunct) could have exercised its own discretion as to the disposition of this fund. It could have dissipated it. It could have utterly deprived the Eastern Cherokees even those who are members of the tribe, of any benefits therefrom.

Will a Court of Equity allow the claimant, the Cherokee Nation, as a body politic, defunct, being defeated in its pretensions, nevertheless to tax the fund of the Eastern Cherokees with the cost of the attempt to defeat the owners of the fund.

The Cherokee Nation, in this case, has denied any trust relation to the Eastern Cherokes and has sought the fund for itself.

Shall a Trustee who seeks to obtain the trust fund for himself, be allowed, when defeated, to charge the trust fund with the expense of an attack on the trust?

The Cherokee Nation has attempted to gain the fund for itself. It has denied the right of the Eastern Cherokees to recover. If the Eastern Cherokees receive this

fund they receive it in spite of the Cherokee Nation, and in the face of the relentless opposition of counsel representing the Cherokee Nation and it would be most inequitable that the Eastern Cherokees should not only pay the expense of conducting their own suit, but should also be required to pay the expense of the suit of their antagonists. It would be an entirely new principle in law; that the successful suitor should be required to pay the counsel of his implacable antagonist.

The Eastern Cherokees therefore insist that their per capita be not diminished by virtue of the contract made on behalf of the Cherokee Nation as of January 16, 1903, since such contract was not made in their interest, but made against their interest and to defeat them if possible of their rights.

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